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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970 ~~1607~~ No. 70-129

RONALD E. CLARK, M.D.,

Petitioner,

-vs-

PEOPLE OF THE STATE
OF MICHIGAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

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13050 Gavel Avenue
Detroit, Mich. 48227

Attorney for Petitioner

TABLE OF CONTENTS OF PETITION

Page

STATEMENT OF THE CASE:

a. The doctor and his treatment 2

b. The patient's death 3

c. The investigation 4

d. The examination and the trial 4

e. The missing and destroyed evidence ... 7

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW 8

ARGUMENT 11

I 11

II 14

III 18

CONCLUSION 21

LIST OF AUTHORITIES CITED

Cole v State of Arkansas,
333 U.S. 196, 201; 68 S. Ct. 514, 517;
92 L. Ed. 644 (1948) 20

Giles v Maryland,
386 U.S. 66, 100, 87 S. Ct. 793, 810
(1967) 12

Page

Miller v Pate,
386 U.S. 1, 87 S. Ct. 785 (1967) 12

in re Oliver,
333 U.S. 257, 275; 68 S. Ct. 499, 508;
92 L. Ed. 682 (1948) 20

People v Clark,
26 Mich App 475, 182 N.W. 2d 632 2

People v Maki,
245 Mich 455 20

People v Ryczek,
224 Mich 106 20

People v Townsend,
214 Mich 267, 183 N.W. 177, 16
A.L.R. 902 (1921) 20

Thompson v City of Louisville,
362 U.S. 199, 80 S. Ct. 624 (1960) 18

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To the Honorable Warren E. Burger, Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

I

JURISDICTIONAL GROUNDS

and

STATE COURT REFERENCES

That review is sought from a criminal appeal in the Michigan Court of Appeals decided September 28, 1970, People v Clark, 26 Mich App 475, 182 N.W. 2d 632, where the Michigan Supreme Court denied leave to appeal on January 22, 1971. Petitioner relies on 28 U.S.C. 1257 (3).

STATEMENT OF THE CASE

The Doctor and His Treatment

Dr. Clark, the defendant herein, has a Bachelor's Degree at Carlton College in 1933, a Master's Degree in 1934 and a Doctorate in Biochemistry at the University of Minnesota in 1937. The Doctor did further research work with National Corn Starch Products' Company in New York and taught at Wayne University in Detroit and directed that school's laboratory of Surgical Research in 1937. Dr. Clark graduated from Medical School in 1943 after internship at Wayne County General Hospital, was Health Officer for Redford Township and has been in General Practice since that time. In 1955, he received a diploma in Psychosomatic Medicine from the University of Vienna in Austria, where he developed a cure for obesity and for weight maintenance involving Chemotherapy; whereby the anxieties of a patient, resulting in inability to control one's appetite, were relieved by Pseudo-Psychiatric suggestion. The method involved

putting the patient under a light plane of chemically induced hypnosis; during which, due to the relaxation of the conscience mind, the patient could be questioned and the patient's answers recorded for later review with the patient so as to relieve anxieties. (13a)

THE PATIENT'S DEATH

On November 3, 1967, Grace Neil, a patient of Dr. Clark, died at the Farmington Medical Group Clinic in Farmington Township, Oakland County, Michigan. The decedent appeared in good physical health prior to her death. She had received numerous Pentothal treatments over the years from Dr. Clark, without untoward event. She was treating with Dr. Clark, according to statements Dr. Clark allegedly made to the People's witnesses, for obesity, high blood pressure and "heart trouble". The Doctor listed her death as due to Coronary Thrombosis; although he had, previous to her death, given an intravenous drip treatment with Sodium Pentothal, a "truth serum". Defendant's wife was uncontradicted in her statement that she was present and had observed that the Doctor had finished administering Pentothal and interviewing the patient and had switched to a harmless saline solution (14a), when he exited from the treatment room. The patient was then left in the treatment room while the Doctor prepared to leave for the weekend, it being a Friday and after office hours (14a). His wife then entered the treatment room a few minutes later to find Grace Neil cyanotic and close to death, if not already so (16a). The saline solution bottle was empty (16a). The Doctor called various relatives of the deceased, the minister of the deceased and an undertaker. Mr. Tharon Neil stated that when he arrived, the Doctor and Mrs. Clark were

alternately giving artificial respiration to his wife (19a). Sgt. Teeples testified that oxygen equipment was present (19a), and the pathologist testified that Grace Neil had apparently received a direct, emergency injection of adrenalin in the heart (20a).

THE INVESTIGATION

On the night of November 3, 1967, according to Patrolman M. Dale Hall of the Farmington Township Police, he was merely cruising along the road in front of the Doctor's clinic when he noticed a hearse illegally parked on the road. He went into the clinic and went through a reception room and into a treatment room where he found Grace Neil's body (22a). Detective Teeples was then contacted by Patrolman Hall (24a) and he took up the investigation from there, including interrogating the Doctor and seizing the patient's records, which were later to become important at the trial. In 1970, Detective Teeples would testify that he had no search warrant at the time of the seizure. Linda Klingman, a secretary of Teeples, in 1971, testified that it was in fact Teeples who directed Hall to investigate a dead body at the clinic. Mrs. Klingman came forward when a Meritorious Citation was to be given by Teeples to Hall for Hall's investigative work in the Clark case. (Transcript being prepared)

THE EXAMINATION AND THE TRIAL

Dr. Clark was arrested on November 14, 1967, eleven (11) days after Grace Neil's death. During the interval, he was questioned on several occasions by the Farmington Township Police, and the arrest came only after he left the city for the first time in two (2) weeks to go to a cottage in Michigan's

thumb district. The Doctor was virtually without funds because he had conveyed his real and personal property in trust to his office manager, who had died in March of 1967, leaving the Doctor's property to her heirs. The Doctor, four (4) years after her death and at the time of parole review on the present case, has been charged with her death by the authorities. The former Mayor of Pontiac and a widely respected divorce attorney, Phillip Rowston, was appointed by the trial Judge, Mr. Rowston's former law partner, to represent Doctor Clark. The Judge had handled a Diathermy Burn case against the Doctor some years previously and had signed a Judgment with a blank line for the amount. Unfortunately, no Motion to Disqualify the Judge was made by Doctor Clark's appointed counsel. Widespread television coverage of the arrest, the examination and the events surrounding the trial caused appointed counsel to move for a change of venue which was granted.

Defense counsel was notified by way of information that the defendant was charged with:

> " Injecting into the body of Grace Neil an excessive quantity of Sodium Pentothal and by so injecting the Sodium Pentothal into the body of Grace Neil, and thus improperly performed and grossly neglected the legal duty that he, as a physician, owed to Grace Neil, and committed Manslaughter. . . "

No mention was made of the Doctor's facilities or of his resuscitative equipment at the Preliminary Examination. At the trial, held in the Summer of 1968, some seven (7) expert medical witnesses testified that they would not use Sodium Pentothal for hypnotic purposes, for obesity, high blood

pressure, heart trouble or any ailment and that they would not use Pentothal in a rural clinic, but rather only in a city hospital and one that would have the full facilities and personnel afforded by a modern city hospital before using Sodium Pentothal as an anesthetic. Michigan Court Rules allow but three experts to a given issue. However, no attempt was made to preserve the issue for review. Testimony was introduced by the deputy coroner, an Osteopath, to the effect that Doctor Clark told the witness that a figure "170/" on the deceased's treatment card, before its seizure, as being the patient's weight and if not the patient's weight, then Doctor Clark's weight (25a). The treatment card was again referred to by the Prosecutor in his closing statement, when he attributed the absence of the card as follows:

> " You will remember that Dr. Posner in his testimony was asked whether or not you would keep good records of Sodium Pentothal as it was administered to a patient in the amount and what not. Dr. Sweet was asked this same question. And they both indicated yes, that it was essential to keep good records.
>
> But we have never seen any records of the amount given to Grace Neil on that date. " (462)

No objection was made to testimony or argument, nor was any continuance requested in order that counsel might obtain copies of the treatment cards held by the authorities. However, during March of 1968, more than three (3) months prior to trial, appointed counsel did make a request that the treatment cards and other materials be returned to Doctor Clark (3a). Some materials were returned as is noted in the affidavit of Phillip Rowston,

annexed hereto and made a part hereof. But, Mr. Rowston was informed that the card had been "lost" by the authorities (5a).

A lethal dosage was testified to by S. David Kutob, Ph.D., a State Chemist. He stated his sources for his conclusion. These went unread and unchallenged at the trial. Mr. Kutob reported a finding of 3.2 Milligram Percent, or 32 parts in 10,000, of Pentothal in the blood of the deceased at both the examination and the trial. At the trial he further testified that he had found 17.1 Milligram Percent, or 171 parts in 10,000, of Pentothal in the brain tissue of the deceased. Counsel for defense moved for a new trial based upon the surprise resulting from the latter finding, as well as the prejudicial result of the missing treatment card together with the prejudicial effect of placing armed guards about the court room at the commencement of the closing argument, among others.

THE MISSING AND DESTROYED EVIDENCE

In addition to the "lost" treatment cards, evidence of the alleged crime in the form of the body organs of the deceased, were destroyed by the State. The defense had an opportunity to have an independent expert examine the organs so as to determine the validity of the State Chemist's findings. Roy Aston, Ph.D. of Wayne State University Medical Laboratory did examine the body organs for Pentothal and concluded that no Pentothal was present in appreciable quantities. His testimony was not used by the defense, although he later testified at a Medical License Board hearing, and testified to the effect that not only did he not find appreciable Pentothal, but that accepting the figures of the State Chemist, and working backwards with the weight of

the deceased, he concluded that an ordinary non-lethal dosage was administered (34a).

In December, 1970, S. David Kutob testified that he had destroyed all of the organs relating to the Doctor Clark case, and that he was not aware of any appeal in the Grace Neil case. (34a) Under oath he admitted that (1a) was a true copy of a note from his secretary. The note clearly indicates that Mr. Kutob was informed of the appeal and of the failure of the defense counsel to be able to obtain specimens of all of the organs held by Mr. Kutob. On appeal to the Michigan Court of Appeals, a specific Motion was made for the Production of Specimens of Organs in order that they could be independently examined outside of the State Chemist's Laboratory, questions having arisen as to the validity of the State Chemist's findings. There was a further Motion for a Remand of the case to the trial court in order that a hearing could be had on false and suppressed evidence. Both Motions were denied. The Motion for a Remand was appealed to the Michigan Supreme Court. Leave to Appeal was denied in 1969.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I

WHETHER OR NOT A STATE CRIMINAL CONVICTION MUST BE SET ASIDE, WHERE THE CONVICTION IS BASED UPON SECONDARY TESTIMONIAL EVIDENCE, THE BEST EVIDENCE, A DOCUMENT, HAVING BEEN SEIZED BY STATE AUTHORITIES AND THEN LOST OR DESTROYED BY THE SAME AUTHORITIES AND WHERE THE STATE THEN ATTRIBUTES THE ABSENCE OF THE DOCUMENT TO DEFENDANT DURING THE ARGUMENT TO THE JURY?

The State Circuit Court answered this question "NO" by refusing to grant a new trial.

The Michigan Court of Appeals answered this question "NO".

The Michigan Supreme Court refused to review the matter.

Petitioner contends the answer should be "YES".

II

WHETHER OR NOT THE CONVICTION OF DEFENDANT ON THE BASIS OF REPEATED INFERENTIAL QUESTIONS TO EXPERT WITNESSES AND INTENTIONAL PREJUDICIAL MISSTATEMENTS TO THE JURY AND THE VERDICT IS BASED THEREON, WHERE THE RECORD IS DEVOID OF EVIDENTIAL SUPPORT FOR SUCH STATEMENTS AND QUESTIONS, IS A VIOLATION OF DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The State Circuit Court answered this question "NO" by refusing to grant a new trial.

The Michigan Court of Appeals answered this question "NO" by adopting said misstatements as a part of its "facts".

The Michigan Supreme Court refused to review the matter.

Petitioner contends the answer should be "YES".

III

WHETHER OR NOT PROCEDURAL DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT ARE VIOLATED WHERE DEFENDANT IS APPRAISED OF THE NEGLIGENT ACTS WHICH HE MUST DEFEND BY WAY OF AN INFORMATION AND A PRELIMINARY EXAMINATION IN AN INVOLUNTARY MANSLAUGHTER PROSECUTION AND THEY INDICATE THAT DEFENDANT'S NEGLIGENCE CONSISTED OF ADMINISTRATION OF AN OVERDOSE OF A DRUG, AND WHERE EVIDENCE WAS ADMITTED OVER OBJECTION AT TRIAL WHICH WENT TO OMISSIONS OF DUTY TO REVIVE AND TO MAINTAIN HOSPITAL BUILDING, EQUIPMENT AND PERSONNEL STANDARDS AND OTHER MATTERS OF WHICH DEFENDANT RECEIVED NO NOTICE BEFORE TRIAL?

The State Circuit Court answered this question "NO" by overruling trial counsel's objections.

The Michigan Court of Appeals answered this question "NO".

The Michigan Supreme Court refused to review the matter.

Petitioner contends the answer should be "YES".

ARGUMENT

I

WHERE A STATE CRIMINAL CONVICTION IS BASED UPON SECONDARY EVIDENCE, THE BEST EVIDENCE HAVING BEEN SEIZED FROM THE DEFENDANT BY THE AUTHORITIES AND THEN LOST OR DESTROYED BY THE SAME AUTHORITIES AND WHERE THE STATE ATTRIBUTES THE LOSS TO DEFENDANT DURING ARGUMENT TO THE JURY, THE CONVICTION SHOULD BE SET ASIDE.

Defendant, Doctor Ronald Clark, was made to appear negligent, incompetent and ridiculous before a jury in an involuntary manslaughter case by the use of a County Deputy Coroner's statement (24a & 25a) indicating that Defendant told the witness that the figure 170/ on the deceased's treatment card was deceased's weight, followed by the alleged statement that it was Defendant's weight on his patient's medical treatment card. Numerous medical witnesses commented on the contraindications of administering Pentothal to a heart patient. This testimony could only be refuted by the best evidence of the matter---deceased's medical treatment record. This card was admittedly "lost" by the authorities after they had seized the card on the night of the death of Grace Neil. This did not, however, prevent the prosecution from using testimony relating to the contents of this record or inferring illnesses not reflected by the medical record or an autopsy.

Even more prejudicial to the Defendant's case was the comment by the prosecutor on the absence

of the card and laying blame for the absence on Defendant in the argument to the jury:

> " You will remember that Dr. Posner in his testimony was asked whether or not you would keep good records of Sodium Pentothal as it was administered to a patient in the amount and what not. Dr. Sweet was asked this same question. And they both indicated yes, that it was essential to keep good records.
>
> But we have never seen any records of the amount given to Grace Neil on that date."

Thus, a testimonial case was built by the State which could only be refuted by the "best evidence" seized by the State and then the absence of the evidence was attributed to Defendant to enhance his appearance as a criminally negligent medical practitioner. Knowing suppression of rebuttal evidence by a State invalidates a conviction, Miller v Pate, 386 U.S. 1, 87 S. Ct. 785 (1967). The question in this case goes to whether "knowing suppression" includes alleged innocent loss by the State of the best documentary evidence, followed by use of prejudicial and incriminatory secondary testimonial evidence which could not be rebutted except by forcing the Defendant to testify, followed in turn by attributing the loss to Defendant, where Defendant's negligence is the principal issue in the prosecution. Bad faith by the prosecution seems to be at the bottom of the rule, Giles v Maryland, 386 U.S. 66, 100, 87 S. Ct. 793, 810, (1967). Since a "criminal trial is not a game in which the State's function is to outwit and entrap its quarry" the comment by the prosecutor on the failure of the Defendant to produce the "lost" card surely transcended all bounds of fair conduct and a reversal should follow.

The Michigan Court of Appeals would not answer this issue stating that it had not been preserved for appeal by court appointed counsel at trial. However, the Appellate Court did note that the trial court did rule on the issue when presented in a motion for a new trial. The State Court of Appeals had further refused to remand the case to the trial court for an evidentiary hearing on the use of false evidence and the suppression of evidence two years earlier and leave to appeal the matter was denied by the Michigan Supreme Court as well. Thus both appointed and retained counsel for Defendant had done all that could be expected to preserve the issue in the face of the prosecutor's argument that the evidence was unaccountably lost.

The State authorities "good faith" must also be viewed against a background of other missing evidence in the case and false testimony. The body organs and blood of the deceased were conveyed to the State Health Laboratories after a week-end stay in the home refrigerator of Farmington Township Police Sergeant Teeples (27a). Tests were then conducted and a defense expert was allowed to examine the organs and blood. For unknown reasons, appointed counsel did not call the expert to testify, although he was called at a State Medical Licensing Board Hearing, where he testified that no appreciable quantities of Sodium Pentothal were detected. At the time of this hearing, the organs and blood had been thrown away by the State's expert. Earlier he had assured appointed counsel that the specimens were being preserved (3a). A motion was made in the Court of Appeals in 1968 to obtain samples of each of the organs and the blood for further confirmatory testing outside the State. This motion was vehemently opposed by the State and the Court

of Appeals denied the motion without comment. It was only in December of 1970, that it came to light that the specimens relating to the Clark case were destroyed. (34a)

S. David Kutob, the State Chemist, had never tested for Sodium Pentothal before and was new to the department at the time of the Clark case, (34a & 29a). At the examination Kutob testified that a source of his conclusions on lethal dosages of Pentothal was probably Dr. Irving Sunshine (29a). Dr. Sunshine disclaimed any such reference (12a). He therefore was sent to Philadelphia to obtain the corroborating testimony of Frederick Reiders, a toxicologist for the City of Philadelphia. However, again at the trial, Kutob made additional references to his sources, but was unchallenged. Following the trial it was discovered that his conclusions were questioned by others and this was one ground for a motion for a new trial (7a). Still later, on appeal, his quoted sources were found either not to support Kutob's conclusions or that they contradicted his very conclusions. A motion was made for a remand at this point but this was denied (9a & 10a).

II

THE CONVICTION OF DEFENDANT IS A VIOLATION OF DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE JURY'S VERDICT IS BASED UPON REPEATED INFERENTIAL QUESTIONS TO EXPERT WITNESSES AND INTENTIONAL PREJUDICIAL MISSTATEMENTS TO THE JURY AND WHERE THE RECORD IS DEVOID OF EVIDENTIAL SUPPORT FOR SUCH STATEMENTS AND QUESTIONS.

The State repeatedly in the closing argument insisted that Doctor Clark had left the room while Grace Neil was receiving Sodium Pentothal, "which dripped into her veins and snuffed her life out":

" He also told Detective Teeples that he had left the room while he was giving the Sodium Pentothal". (458)

" Each of the doctors testified that the rate of flow in this drip method can change if you are not present." (461)

" He walked out of the room and he left the infusion, Sodium Pentothal, running into her." (465)

The argument was not objected to and only briefly answered by reference to the testimony. Repeated questions to the expert witnesses inferred the same falsity. But if the jury was misled by the repeated misstatements, they are not alone. The Michigan Court of Appeals reviewed the following in the State's Counter Statement of Facts:

Page 1:

" on the night of decedent's demise, the Defendant had infused her with an intravenous injection of Sodium Pentothal and then exited from the treatment room and left her unattended."

Page 8 :

" Violet Clark, the Defendant's wife, was the last defense witness. She indicated several times that Doctor Clark had left

> Grace Neil alone on November 3, 1967, when she was receiving the fatal Sodium Pentothal infusion."

And the Appeals Court then stated in its Opinion:

182 N.W. 2d 632, 633 2nd paragraph:

> "Other witnesses' testimony indicated that Dr. Clark had left the patient unsupervised during the infusion of the drug."

And at Page 635:

> " Expert opinion clearly established that the failure to constantly supervise a patient being infused with Sodium Pentothal was violative of accepted medical standards. . . "

And Page 635:

> "...and left Mrs. Neil alone in the examination room during infusion." (emphasis added)

The matter was briefed in the Michigan Supreme Court, but to no avail, Leave to Appeal was denied.

The record on the matter is clear:

Page 87, Direct Examination of Detective Teeples:

> A "... He said that he had been treating her, giving her a treatment of Sodium Pentothal, and she was receiving this treatment by drip method intravenously.

> And that his wife had gone into the room where she was laying on the couch receiving this treatment, and had found her dead."
>
> A..." He told me that she had been in the room alone taking the treatment and that his wife had gone in and found...."

Page 110, Cross Examination of Detective Teeples:

> Q "You don't know, then, whether this bottle that she had was the first or the second bottle that she had received that evening, do you?"
>
> A "I don't know which number bottle it was; yes, sir."
>
> Q "You don't know nor was any discussion held concerning whether or not this bottle that you saw contained only pure saline solution?"
>
> A "I have no idea, sir."

The uncontradicted testimony of the doctor's wife was that a harmless saline solution was flowing into the patient's veins, when the doctor left the room; the hypnotic psychotherapy portion of the treatment having been concluded (15a).

That the State willfully misstated the evidence is shown by the repetition of the misstatements to the Court of Appeals. That reasonable men could be prejudiced by such statements is shown by the Court of Appeals' adoption of the statements without

compliance with Defense counsel's request that the record be searched by the Court of Appeals. The gist of the offense charged was the absence of Defendant from the treatment room while his patient was being infused with a dangerous drug. The point was argued but not proven. It is a violation of due process requirements to convict and punish a man without evidence of his guilt, Thompson v City of Louisville, 362 U.S. 199. 80 S. Ct. 624 (1960).

III

WHERE DEFENDANT IS APPRAISED OF THE NEGLIGENT ACTS WHICH HE MUST DEFEND BY WAY OF AN INFORMATION AND A PRELIMINARY EXAMINATION IN AN INVOLUNTARY MANSLAUGHTER PROSECUTION AND THEY INDICATE THAT DEFENDANT'S NEGLIGENCE CONSISTED OF ADMINISTRATION OF AN OVERDOSE OF A DRUG, AND WHERE EVIDENCE WAS ADMITTED OVER OBJECTION AT TRIAL WHICH WENT TO OMISSIONS OF DUTY TO REVIVE AND TO MAINTAIN HOSPITAL BUILDING, EQUIPMENT AND PERSONNEL STANDARDS AND OTHER MATTERS OF WHICH DEFENDANT RECEIVED NO NOTICE BEFORE TRIAL, PROCEDURAL DUE PROCESS REQUIREMENTS UNDER THE FOURTEENTH AMENDMENT ARE VIOLATED.

The Michigan Court of Appeals refused to review this issue, stating that the information sufficiently charged Statutory Manslaughter and that Defendant did not object at trial.

Looking to the record (72):

> Q. "Did this room, Doctor, which you just described, did it appear to be a room

that might be found in any other doctor's office within the county of Oakland, same manner, same fashion?"

A "Well, it...

Mr. Rowston (interposing) If it please the Court, I will object to that as being immaterial. I don't see what significance that has in this case."

The objection was overruled and no continuing or more specific objection was made by court appointed counsel to the flood of testimony criticizing Defendant's treatment, his offices revival equipment, staff and even his psychiatrists couch, (72, 154, 241, 159).

The information defined the specific act of negligence charged, "in that he, the said Ronald E. Clark, did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal."

By no stretch of imagination could Defendant infer, prior to trial, that an oxygen mask or his psychiatrist's couch would be subjects of central attention for the jury's benefit during trial and in the closing argument (460, 461, 450).

In view of the length of the State's argument to the jury on these items, there can be little doubt that they had a prejudicial effect on the juror's minds and their verdict indicating a gross negligence finding---hardly a harmless error.

In Michigan as elsewhere it is the rule that unless the words of the Criminal Statute are complete in their definition and description of an offense

resulting from or arising out of an act not criminal in itself and contain all the essential ingredients thereof, all matters and circumstances which are necessary to show the illegality of the act or omission on which the accusation is based must be included in the information.

People v Ryczek, 224 Mich 106;

People v Maki, 245 Mich 455:

People v Townsend, 214 Mich 267, 183 N.W. 177, 16 A. L.R. 902 (1921)

The last case states at Page 274:

> but in case of manslaughter committed through gross or culpable negligence while doing a lawful act the duty which was neglected or improperly performed must be charged as well as the acts of the accused constituting failure to perform or improper performance.

It would seem clearly established by the principles propounded by this Court that it is fundamental and of jurisdiction importance that the accused have notice of that which he is charged with in order that he might meet or explain the accusations. Cole v State of Arkansas, 333 U.S. 196, 201; 68 S. Ct. 514, 517; 92 L. Ed. 644 (1948); in re Oliver, 333 U.S. 257, 275; 68 S. Ct. 499, 508; 92 L. Ed 682 (1948).

It is apparent from the fact that of eight full days of trial the defense occupied but one single day and consisted of two lay witnesses and a single expert against a "formidable array" of experts in the words of the prosecutor, indicates defense preparation for but the single accusation made and noticed.

CONCLUSION

Stripped of the necessary evidence for cross examination of State witnesses; deprived of advice of the many charges of negligence against him and prejudiced by repeated reiteration of deliberate misstatements of the evidence, the accused in this case could hardly be expected to put up any more than the half-hearted defense found in the record. The Fourteenth Amendment therefore dictates a reversal and a remand on the constitutional issues presented herein in order that Defendant may have a fair chance---a fair trial.

It is respectfully submitted that Defendant's Writ of Certiorari should be allowed since the Michigan Court of Appeals has not decided the substantial Federal questions presented by this appeal in accord with applicable decisions of this Court.

Respectfully submitted,

JAMES E. WELLS

Attorney for Petitioner

TABLE OF CONTENTS TO APPENDIX

Page

A. DOCUMENTS:

1. Note to S. David Kutob from Secretary 1a
2. Letter to S. David Kutob from Bruce T. Leitman 2a
3. Letter to Philip E. Rowston from S. David Kutob 3a
4. Affidavit of Philip E. Rowston 4a
5. Motion for New Trial 6a
6. Motion for Remand and Brief in Support of Motion 8a
7. Affidavit of Irving Sunshine, Ph.D. 12a

B. EXCERPTS FROM TRIAL TRANSCRIPT:

1. Gordon, William Edward Direct Examination 12a
2. Clark, Violet Direct Examination 14a
3. Neil, Tharon Direct Examination 18a
4. Teeples, Earl Joseph Direct Examination 19a
5. Olsen, Richard E. Direct Examination 20a
6. Hall, Melvin Dale Direct Examination 21a
7. Teeples, Earl Joseph Direct Examination 24a
8. Posner, Irwin B. Direct Examination 24a
9. Teeples, Earl Joseph Direct Examination 26a
10. Kutob, S. David Direct Examination 28a
11. Kutob, S. David Cross Examination 29a

Page

C. MEDICAL LICENSING BOARD HEARING
1. Aston, Roy
Direct Examination..... 31a

D. PRELIMINARY EXAMINATION, Detroit Recorder's Court No. 70-08009, 1970
1. Kutob, S. David
Cross Examination..... 34a

E. MICHIGAN COURT OF APPEALS OPINION..... 36a

NOTE TO S. DAVID KUTOB FROM SECRETARY

Doctor Kutob:

Bruce Leitman phoned 11-15-68 at 1:30 pm with reference to the materials submitted to you on Hannah Bowerbank, deceased, patient of Dr. Clark.

Bruce said, first, that the Court of Appeals have denied their motion to have all the tissues, etc. turned over to the defense, in the Grace Neil matter.

Second, he wanted to know if you would consent to permit a qualified scientific observer for the defense, to be approved of by you in advance, watch you do the analytical work on the Hannah Bowerbank specimens. He felt that if he did permit such an observer to be present, it could save you a lot of extra work and bother, should your results disclose toxic concentrations of a substance. He has stated there is to be only one person, to be approved of by you and him, in advance. He further said he was going to see to it that (as I understood him) Mrs. Clark isn't to bother you in any way, come up here, phone, write or anything else.

Will you phone him Monday, and discuss the matter with him. The number is 338-4751, extension 573 (the extension number is changed).

Virginia

LETTER TO S. DAVID KUTOB FROM
BRUCE T. LEITMAN

January 9, 1969

S. David Kutob, PHD
Chief Toxicologist
Division of Crime Detection
Department of Public Health
3500 N. Logan
Lansing, Michigan 48914

RE: Analysis of Hannah Bowerbank

Dear Dr. Kutob:

On or about January 3, 1969, you submitted to this office the results which you obtained from a toxicological examination of the remains of one Hannah Bowerbank.

Please be advised that it is the strong desire of this office that, under no circumstances, you permit any scientist or physician to examine these remains without the express written permission of this office. This includes scientists who wish to run examinations at your office or at any other place.

Furthermore, because of the legal technicalities involving this case, it is my wish that you refuse to communicate with any member of the Clark family, their Attorneys, or the persistent press.

If it becomes necessary for someone to have access to your analysis or to you, then I will so indicate by express writing.

Thank you very much for your cooperation in this matter.

Very truly yours,

/s/ Bruce T. Leitman
Bruce T. Leitman
Assistant Prosecuting Attorney

BTL/jt

LETTER TO PHILIP E. ROWSTON
FROM S. DAVID KUTOB

STATE OF MICHIGAN
DEPARTMENT OF PUBLIC HEALTH
3500 N. Logan
Lansing, Michigan 48914

August 14, 1968

Mr. Philip E. Rowston
Dieterle, Rowston & Mann
2057 Orchard Lake Road
Pontiac, Michigan 48053

RE: Dr. Ronald E. Clark

Dear Mr. Rowston:

In response to your letter dated August 8, 1968, concerning specimens taken from Grace Neil, deceased, we still have the samples and they have been refrigerated.

Sincerely yours,

/s/
S. David Kutob Ph. D.
Toxicologist
Division of Crime Detection

SDK:vb

cc: Mr. Bruce Leitman

C67-3961

AFFIDAVIT OF PHILIP E. ROWSTON

AFFIDAVIT

STATE OF MICHIGAN)
ss.
COUNTY OF OAKLAND)

PHILIP E. ROWSTON, being first duly sworn, deposes and says:

1. That he was Court appointed Counsel for Ronald E. Clark, M.D., Respondent, in a criminal prosecution involving manslaughter from December 1967 to December 1968.

2. That on March 15, 1968, Mr. Bruce Leitman, Assistant Prosecutor of Oakland County, was requested by letter to furnish certain records including patient cards of the deceased Grace Neil.

3. That on April 4, 1968, Mr. Leitman advised me by telephone that certain records were being mailed from the Farmington Township Police Department but when no records were received, Mr.

Leitman accompanied me to the office of the Farmington Police Department on April 17th, 1968 and through his personal efforts and assistance, the 1966-67 Day Book; Folder of Grace Neil and Electrocardian Tape were obtained.

4. That the Patient Cards of Grace Neil covering the period of treatment to the date of her death were unavailable and were not returned at this time.

5. That during the trial, in response to a demand to produce said Patient Cards, the investigating officers of the Farmington Township Police Department and a member of the Oakland County Prosecutor's Department produced only two 4 x 6 Yellow Treatment Cards and stated that the most recent treatment card covering the period of time immediately prior to the death of Grace Neil was in fact "lost".

6. That said lost or missing card was vital to the defense of the Respondent and precluded cross examination of one or more of the People's witnesses concerning various pertinent facts.

Further Deponent sayeth not.

/s/ Philip E. Rowston
PHILIP E. ROWSTON

Subscribed and sworn to before me, a Notary Public, this 3rd day of February, A.D. 1970.

/s/ Mary R. Good
Mary R. Good
Notary Public for the County
of Oakland, State of Michigan

My commission expires: 1-9-71

MOTION FOR NEW TRIAL

Now comes the above Defendant by PHILIP E. ROWSTON, his Attorney, and moves the Court for an Order setting aside the conviction and vacating the sentence heretofore imposed in said cause and granting a new trial, for the following reasons:

1. Because the verdict of the Jury is contrary to the law.

2. Because the verdict of the Jury is contrary to the great weight of the evidence.

3. Because of the prejudicial misconduct of two-armed, uniformed Officers of the Ingham County Sheriff's Office when they appeared in open Court and positioned themselves at the main entrance of said Court Room in Mason, Michigan, as the case was resumed for final arguments by the Prosecutor and instructions to the Jury, in that their presence created a presumption of fact to the Jury that the Defendant was guilty and likely to attempt an escape from the Courtroom before they commenced their deliberation, and said impression biased and prejudiced the Jurors in their consideration of the case and resulted in a miscarriage of justice.

4. Because the Court erred in denying Respondent's Motion for a mistrial in that the three local newspaper reports quoted to the Court clearly indicated that the Respondent was being tried for Murder instead of Manslaughter and that Wayne and Oakland County Officials were investigating other deaths attributed to the Respondent, all of said newspaper releases being prejudicial and biased, which prevented the Respondent from receiving a fair and impartial trial and resulted in a miscarriage of justice.

5. Because one of the People's expert witnesses, Dr. S. David Kutob, testified at the trial hereof, that he had analyzed the brain tissue of the deceased, only a week prior to said trial, and found 17.1 mg percent concentration of Thiopental which is inconsistent with his previous testimony that he found 3.1 mg percent concentration of Thiopental in the blood sample taken from the deceased and that Respondent was taken by surprise and was unable to secure competent testimony to rebutt the opinion of this expert witness before the trial was concluded.

6. Because since the hearing of said cause, Respondent has just learned of the testimony of DR. LESTER C. MARK, a witness who was unknown to him at the time of said trial and whose testimony is material to the issues of said cause and would be likely to change the results thereof, and, if, a new trial is granted, herein, said witness will be available and will testify in behalf of the Respondent that a 3.1 mg percent blood concentration of Thiopental is not lethal and that there is a likelihood of technical errors in methodology concerning the testimony that a concentration of 17.1 mg percent was found in the brain tissue since that amount is disproportionately large in comparison with that of 3.1 mg percent concentration in the blood and that technical errors are more likely to occur with tissue analyses, which are more complicated than blood analyses, and that all samples of decedent should be re-examined and analyzed to determine the Thiopental concentration present in each organ for a more comprehensive comparison.

7. Because the patient's records of Grace Neil were not furnished Respondent prior to the trial although requested on March 15th, 1968, which prevented the Respondent from conducting the required

research and review of his patient's prior history of treatments and resulted in a miscarriage of justice.

This Motion is based upon the records and files in said cause and upon the Affidavits of PHILIP E. ROWSTON and DR. LESTER C. MARK, hereto attached.

Philip E. Rowston
PHILIP E. ROWSTON
Attorney for Defendant,
Ronald E. Clark, M.D.

Dated: August 8, 1968

MOTION FOR REMAND AND
BRIEF IN SUPPORT OF MOTION

MOTION FOR REMAND

Now comes, RONALD E. CLARK, M.D., Defendant-Appellant above, by his attorney, JAMES E. WELLS, and moves the Court to order a remand of the above entitled cause for a hearing of evidence relating to the knowing use by the state of false evidence and suppression of evidence in the above cause, or alternatively to order an extension of time of thirty (30) days for filing appellants brief or taking other action, for the following reasons:

1. The state used the testimony of a state employee and chemist, S. David Kutob, which was crucial in obtaining the conviction of appellant. (record, P. 39, P. 45 et seq.)

2. That said testimony was false, misleading and at variance with physical facts known to experts in a particular field and was calculated to bring about appellant's conviction.

3. That said testimony was alleged at the trial to have been based upon certain references which do not in fact support the testimony and tend to discredit said testimony.

4. That one such reference does not at all exist and was referred to at the preliminary examination (Transcript P. 59 and 60 annexed hereto) and the trial. (record, P. 57, Affidavit of Irving Sunshine, M.D. annexed hereto)

5. That said reference was questioned by defendant's attorney at the preliminary examination.

6. The following said examination and prior to trial the state employee was send to the city of Philadelphia in the State of Pennsylvania and elsewhere to find an expert who would corroborate the state employee's testimony.

7. That Frederic Rieders, a chemist employed by the city of Philadelphia, responded and testified at the trial in substantiating S. David Kutob's statements.

8. That said Rieders' corroborating testimony is in conflict with his own published works.

9. That the above facts have only recently come to the attention of appellant's attorney on appeal.

10. That the aforesaid hearing concerns a factual matter involving experts that would be dispositive of the appeal under the authority of Miller -vs- Pate, 386 U.S. 1.

11. That in the event, this Court denies the motion, for any reason, appellant will require an

additional time extension of thirty (30) days to file his briefs or to seek further appeal on this motion.

This motion is based on records and files in this cause together with the attached exhibits.

/s/ James E. Wells
James E. Wells
Attorney for
Defendant-Appellant
13050 Gavel Avenue
Detroit, Michigan 48227
933-4143

Dated: May 9, 1969

BRIEF IN SUPPORT OF APPELLANT'S MOTION FOR REMAND

The People urge that the issue presented by Appellant's motion was waived by Appellant's court-appointed trial counsel, a former law partner of the trial judge, or that present counsel is estopped to raise such issue.

MILLER -vs- PATE, 386 US 2; 87 S. Ct. 785 held that "the Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence."

It would seem that there can be no passive waiver of procedural due process. The testimony in question is admitted by the People to have been crucial to Appellant's conviction. The testimony went to the cause of death in this manslaughter case. If false, and the evidence so indicates, the conviction must be set aside.

As to the indignant assertions of purity from the prosecutor's office, the fact that two elections in last November's contests were based in part on Dr. Clark's conviction (see attached exhibit) would seem to indicate that the personnel in that office have no hesitancy in trading upon the misfortune and tragedy of others to gain political office and favor.

The writer, perhaps, is over-idealistic in expecting local overworked prosecutors to exert as much effort in protecting the accused as convicting them, but the words of Mr. Justice Campbell in WELLAR -vs- PEOPLE, 30 Mich. 16, stand out:

"A public prosecutor is not a plaintiff's attorney, but a sworn minister of justice, as much bound to protect the innocent as to pursue the guilty, and he has no right to suppress testimony."

In the interest of justice, the Motion for Remand should be granted.

JAMES E. WELLS
Attorney for
Defendant and Appellant
13050 Gavel Avenue
Detroit, Michigan 48227
933-4143

Dated: May 23, 1969

AFFIDAVIT OF IRVING SUNSHINE, PH. D.

IRVING SUNSHINE, Ph.D., being first duly sworn, deposes and says that he has published articles relating to barbiturates. In none of these publications were any data presented on the correlation of Sodium Pentothal with the clinical condition of patients.

Further Deponent sayeth not.

/s/ Irving Sunshine
IRVING SUNSHINE, Ph.D.
Cuyahoga County Coroner's Office
2121 Adelbert Road
Cleveland, Ohio. 44106

Dated: August 14th, 1968.

Subscribed and sworn to before me this 14th day of August, A.D. 1968.

/s/ Leona Phalsgraff
Leona Phalsgraff,
Notary Public for the County of Cuyahoga, State of Ohio

My commission expires: January 4th, 1972.

EXCERPTS FROM TRIAL TRANSCRIPT

WILLIAM EDWARD GORDON
DIRECT EXAMINATION

(271) Q Why is that?

A Because what you are trying to do when you do use Pentothal, or, also, Sodium Pentothal,

when you do use these, you are trying to produce a state of ultra-consciousness, which in a way is considered one of the first levels of anesthesia, (272) wherein the patient's state of consciousness is altered. They tend to lose some of their inhibitions, they tend to become less fearful, they tend to become more calm and relaxed, and they will be able to talk more easily and freely about things they might otherwise not have been able to talk about.

Now, this is close to the level that you want to accomplish. If you go ahead and carelessly or injudiciously continue to inject this drug through a stage of delirium and on to surgical anesthesia and on into a paralysis of part of their brain, this is of absolutely no value.

Q As psychiatrically speaking, is that correct?

A Yes, sir.

And I might add that there is one more important aspect of this, too, when Pentothal is used psychiatrically. The very material which is developed during the time the patient is talking with you under the influence of the drug, the things that they say, the feelings that they express are then taken like pieces of a jigsaw puzzle, or as tools with which you and the patient can then work when the patient is again conscious, rational and not under the influence of the drug. Now, this is an absolute requirement.

To just shoot in Pentothal indiscriminately is of no value.

(273) It must be for a purpose and reason. It must be used to help this patient once the patient is free of the drug.

(381) VIOLET CLARK
DIRECT EXAMINATION

* * * put everything into two cars and not take up three. So, it must have been 7:00 o'clock before they were going to go ahead, and then we were going to follow later.

Q Where is the cottage located where you were going?

A It is up in the Thumb, near Port Austin.

Q What were your plans for the weekend, how long were you going to be away?

A For the entire weekend. Quite often we come back on Sunday afternoon and quite often we don't come back until Monday morning.

Q Had you done that previously with the Philpotts?

A Yes.

Q After it was agreed how you would travel up to the cottage, what next happened?

A I got my things together so that we could put them in the car. And I saw the Doctor come out of the treatment room and he gave me the nod (indicating) so we could get things ready. So, we started to close up the place and get the windows and everything in order. Then I went into the treatment room to take a look at Grace.

Q Did he say anything to you as he came out of the treatment room?

A Not that I remember, except --

Q Can you tell us how long before he left the treatment room that you last heard conversation between the two parties in the room?

(382) A Well, they were in there quite a long time, it seemed to me. I was anxious, of course, for us to get ready to go. And he went through his regular treatment. It must have been a period of twenty-five minutes. And five or ten minutes before he came out of the room, they were still talking. I was there. The conversation went on as usual in the regular treatment.

Q You say he remained in the room for about twenty-five minutes and you heard conversation at least up until five or ten minutes before he came out?

A And then when he came out, he gave me the nod, which I knew it was time for me to get our things ready so we could go.

Q What was said to the Jelfs, you agreed to leave after he came out?

A Yes.

Q Then, did they leave the office?

A Yes, they went out the front door.

Q Where was Dr. Clark at that time?

A He went out to the back.

Q What did you do?

A I went downstairs to get my luggage together. And then I came back upstairs to close up the building.

Q How long would that take?

A Five minutes, six minutes, eight minutes.

Q Was there anyone in that room with Grace Neil during that five-minute period?

(383) A I don't think so.

Q Then, what did you do?

A I went into the room where Grace was to see how she was, as I often do with the patients. The first thing I noticed was that the saline bottle was completely empty.

Q When you refer to the saline bottle, are you referring to the People's proposed Exhibit -

A (Interposing) That's right. There should be a bottom part to that on which it hangs.

Q - 3?

A Yes.

Q Is that the way it is suspended from the wall (indicating)?

A Yes.

Q And this is called saline solution?

A That's right.

Q Does it come in that state, completely clear?

A Completely clear.

Q How was Mrs. Neil dressed when you entered the room?

A She had a -- she was covered with a blanket -- she had her clothing on. I didn't notice -- she never undressed when she took treatment, she didn't have to.

Q Did she have a blanket or anything over her?

A Yes.

Q What did you first observe when you entered the room?

A The saline bottle being --

Q That was empty?

(384) A That was empty.

Usually, it is about half full because it takes ten or fifteen minutes afterwards and the saline is the second part of the treatment. It has nothing to do with the thiopental, or Sodium Pentothal. It is completely separate from the treatment that the Doctor gives with thiopental.

* * *

THARON NEIL
DIRECT EXAMINATION

(195) A I said, "What did you say?" Then he told me again, he said, "You had better call Rev. Bayne, and here is his telephone number."

I said, "Oh, no."

He said, "I'm afraid so. She's had a heart attack."

Q Now, how long would you say that was when he said, "Call Rev. Bayne;" "I'm afraid so." How much time would you say elapsed between that time and the time you got to the Doctor's house and were in the room where Grace was lying?

A He had called -- it must have been around quarter to or ten minutes to eight when he made the last call.

Q Then, you got there when, fifteen minutes or how many minutes later?

A Well, ten or fifteen minutes later.

Q Ten or fifteen minutes later after he had called the second time?

A Yes.

Q And said, "Call Rev. Bayne;" "I am afraid so"?

A Yes.

Q And when you arrived -- you heard Mrs. Neil's testimony, didn't you?

A Yes.

Q When you arrived, did you see Mrs. Clark administering mouth-to-mouth resuscitation?

A Yes, I did.

* * *

EARL JOSEPH TEEPLES
DIRECT EXAMINATION

(98) * * *

Q What was the next thing that happened? If anything.

A I think I mentioned that I had already taken pictures in there.

Q Yes.

A I went into the next room -- which would be like an adjoining bedroom in a common home -- another treatment room, and looked in there. I noticed nothing in particular there. I did notice a metal flask of "Lifeogen" brand oxygen, which I happen to be familiar with because I bought one for a friend of mine whose child has asthma.

* * *

RICHARD E. OLSEN
DIRECT EXAMINATION

(35) A Detective Teeples.

Q Do you observe Detective Teeples in the courtroom?

A Yes.

THE COURT: Go ahead.

Q (By Mr. Bain) What were the results of this autopsy, Doctor?

A The autopsy showed the body of a middle-aged woman in a good state of general health.

In spite of my most careful examination both of the body externally, the inside of the body, inside of the head and neck, and of microscopic sections made from the organs, I was not able to point to anything and say, "This is the cause of death."

I did have an opinion as to the nature of the death, however.

Q And would that be a medical opinion, Doctor?

A Yes.

Q And what is that opinion based on?

A On the surface of this woman's body were multiple needle puncture wounds of the type made by hypodermic needles such as doctors use for injections. There were at least four

fresh wounds; two below the left breast, on the chest. I thought those were probably made after death, because there was no bleeding into the skin about them. There was one on the left wrist with a strip of adhesive tape over it. This showed bleeding and appeared to be fresh. There was one on the side of the right thigh, also, with a strip of * * *

MELVIN DALE HALL
DIRECT EXAMINATION

* * *

(29) Grand River on that evening?

A I believe it was a little later than 6:00 or 7:00 o'clock.

Q What time?

A Exactly, I think it was 8:45 p.m.

Q And what, if anything, unusual happened at that time?

A I observed a hearse that was parked on the south side of Grand River, in a no-parking zone, and without any lights on it or anything like that. It was just parked, and it was dark.

Q And after you saw the hearse, Patrolman, what did you do then? If anything.

A I parked my scout car behind the hearse, got out and checked it to see if there was anything around, or anything, or what the reason for it being parked there was.

Q And what did you do then?

A I couldn't locate anyone around the hearse. So, then, I went to the Doctor's office, which was the only place I could think of anyone being at. And the hearse was parked immediately in front of the Doctor's office on Grand River.

Q And what happened then? If anything.

A Knocked on the door, and I did not get any answer. So, I tried the door and it was open. So, I entered the building.

Q What did you do then?

A I saw a lady in -- I imagine she would be around fifty years old -- standing in the front part of the building. And I asked her if she knew who the person was that was driving (30) the hearse. And she didn't give me any answer.

Q What happened then? If anything.

A I then observed a person who later I found out was Dr. Clark. He was walking towards -- from the back of the building, towards the front. And I asked him then if he knew who was driving the hearse.

Q What, if anything, did he reply at that time?

A He told me that he had had a patient die in his office and that the hearse was there to pick up the body.

Q And what happened then? If anything.

A I asked him where the driver was. I told him I wanted the hearse moved out of the street, it was a traffic hazard.

Q Is Grand River a heavily traveled street in that area?

A Yes, sir.

Q What happened then?

A He said, "Maybe the driver is out back."

And, so, Dr. Clark kept walking closer and closer and closer to me, and I stepped around him and walked past him to about midway in the office building there to where I seen a door was open.

Q What, if anything, did you observe at that time?

A I observed a man kneeling down -- he was either still kneeling or else just rising from a kneeling position.

And I peeked around the door a little farther -- the door was only partially opened -- I peeked around a little farther and I noticed a person on a couch, (31) I would say a makeshift bed-like, it was low and so forth, and there was a body laying there of a woman that appeared to be dead to me.

Q What happened then?

A I asked the gentleman then -- who had by this time stood up -- if he knew anything about the hearse out in front. And he said it wasn't his

but it belonged to a funeral parlor and the driver was around there some place and he was there to pick up the body.

Q I see.

* * *

EARL JOSEPH TEEPLES, being first duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. BAIN:

(85) * * *

Q Did you have occasion to go to the Clark home, the Clark office?

A Yes, sir.

Q What caused you to go there?

A Officer Hall alerted me to a situation there where somebody had passed away.

* * *

IRWIN B. POSNER
DIRECT EXAMINATION

* * *

(74) Q I see.

Now, did you ask or did you have an opportunity to observe his medical records regarding Grace Neil?

A I did.

Q Now, what, if anything, unusual did you notice on them?

A I noticed a figure of one hundred and seventy.

Q One hundred and seventy?

A Yes, sir.

Q Do you know what that figure meant?

A I asked Dr. Clark, and he said that was the weight of the patient.

Q Now, this was on Mrs. Grace Neil's medical chart, is that correct, or records?

A Yes, sir.

Q The figure one seventy?

A Yes, sir.

Q And he said that was her weight?

A Yes, sir.

Q What did you say, if anything, in response to that?

A I said that Mrs. Neil didn't look like she weighed more than one twenty to one hundred twenty-five pounds.

Q What, if anything, did he say in response to that?

A And he said no, on second thought, that wasn't her weight, (75) that was his own weight.

Q That was his weight?

A Yes, sir.

Q Of one hundred seventy pounds, on her medical record?

A Yes, sir.

Q Doctor, in your practice as a physician and surgeon, did you ever have an opportunity to put your own personal statistics or characteristics on your patients' medical records?

A No, sir.

* * *

EARL JOSEPH TEEPLES
DIRECT EXAMINATION

(103) * * * he said these were the boxes that he had discarded after giving Grace Neil her treatment. And I asked if what had been in these boxes was what he had given Grace Neil, and he said yes.

Q What was the next thing that happened then? If anything.

A I think Dr. Posner arrived -- Dr. Posner was there, I'm sorry.

I had conversation with my superior. Arrangements were made to temporarily prevent

the removing of the body for embalming or any funeral arrangements. We finally arranged to have the body transported to St. Joseph Hospital, in Pontiac.

Q And it is my understanding, according to Dr. Olsen's testimony, that an autopsy was performed the next morning; is that correct?

A Yes.

Q Were you present when this autopsy was performed?

A Yes.

Q Were you present when Dr. Olsen removed the samples, or the samples of the body fluid and blood and other specimens from the body of Grace Neil?

A Yes, sir.

Q And at that time, he gave all those specimens to you, did he?

A Yes, sir, he did.

Q What did you do with them?

(104) A I took them and put them in my refrigerator and kept them there until I was able to drive to Lansing, to the Michigan Department of Health Crime Lab in Lansing, Michigan, where I turned them over to the Toxicology Department there.

Q And at that time, did you also turn over the other items that we have mentioned?

A Yes, sir.

Q And those were the items that Dr. Kutob read off this morning, or earlier this afternoon, when he testified?

A Yes, sir.

Q Detective, you indicated that you saw some oxygen equipment * * *

S. DAVID KUTOB
DIRECT EXAMINATION

(41) Q And your next educational?

A I obtained my Ph.D. in pharmacology and toxicology from Tulane Medical School, in New Orleans, Louisiana, in 1961.

Q And what practical experience have you had in this field, Doctor?

A After graduation, I worked for the Norwich Pharmacal Company, Norwich, New York. This is concerned with pharmaceuticals, and as a group leader in toxicology.

Q And after that, Doctor?

A In 1964, I joined Loyola University, in the South, New Orleans, Louisiana, as assistant professor in pharmacology and toxicology.

Q And how long were you an assistant professor at Loyola?

A Till 1965.

Q And after that, Doctor?

A I was offered a position overseas; from which I returned in 1966 and joined the Crime Lab, in Lansing.

Q And you are still with the Crime Lab?

A Since 1966, December, 1966; I am still with the Crime Lab, of Lansing.

Q Doctor, over and above your formal schooling; have you attended any special classes or special seminars or anything of that nature in the toxicology field?

A Well, of course during my training for Ph.D., I have done some research and presented some papers at the Federation of -- of the Biological Societies, in Atlantic City and in * * *

S. DAVID KUTOB
CROSS EXAMINATION

(57) A No.

Q May I see that, please?

Now, did you refer to any other reference material?

A Yes, I did.

Q What else did you refer to?

A Dr. Irving Sunshine.

Q Where is he located?

A He is a toxicologist for the -- I don't know if I can pronounce it right -- Cuyahoga County, Cleveland, Ohio.

Q When did he write the article?

A He wrote the article in 1957.

Q Do you have a copy of that with you?

A Yes, sir, I do.

Q May I see that, please?

Did you refer to any other sources to determine what a lethal dosage of Sodium Pentothal consisted of?

A Well, not on fatalities. Others are collections here and there which I cannot quote offhand.

Q None of these reference materials that you have submitted to me today were present at the time you testified in the examination, were they?

A What do you mean "present"? On me?

Q You didn't have them?

A No, I didn't have them.

* * *

MEDICAL LICENSING BOARD HEARING

(3) ROY ASTON, M.D., having been first duly sworn by the Court, was examined and testified under oath as follows:

DIRECT EXAMINATION
BY MR. WELLS:

Q Witness, will you give us your name, please, for the record?

A Roy Aston.

Q And that last name is spelled how?

A (Spelling) A-S-T-O-N.

THE COURT: Counsel, would you use the microphone back there, please?

MR. WELLS: Oh, okay. Fine, your Honor.

THE COURT: We can hear you better that way.

Q Now, do you have a position at the Wayne State University School of Medicine presently?

A Yes, sir, I do.

Q And what is that position, please?

A Associate Professor of Anesthesiology.

Q I see. Do you hold a Ph.D. Degree?

A Yes, sir, I do.

(4) Q Dr. Aston, -- or Professor Aston, rather, would you relate for us, if you can tell us, did you have occasion in the year of 1968 to examine certain specimens in Lansing or in Detroit, relating to one Grace Neil, -- and that is N-E-I-L?

A Yes, sir.

Q And was that about September 12th or thereabouts?

A I don't recall the date, sir.

Q I see. Now, did you make these tests in Lansing, Michigan, or were they conducted in the City of Detroit, or both places?

A They were conducted, -- or, the tests were conducted in Detroit.

Q I see. That was in the City of Detroit here, is that right?

A Yes, sir.

Q Now, did you use or employ any of the equipment in Lansing, in the State Health Department, if you can recall?

A Not for the ones, -- or, not for the analysis of my own tissue samples, or that is, the ones that I had in my possession, no.

Q I see. Had you made ultra violet ray tests on various samples for barbiturates, before this particular time?

A Yes, I had.

(5) Q Did you have anybody working under your direction, doing the manual work, in this particular case?

A Yes, I had.

Q And what was his name, please?

A That was Sheldon Stolman (spelling) S-T-O-L-M-A-N.

Q And is he in the same field as you are?

A Yes, he is. He trained with me for his Ph.D., in fact.

Q I see. And is he a Ph.D. at this time?

A Yes, sir, he is now.

Q I see. Were you given two blood samples, and one sample of the stomach contents of Grace Neil, if you can recall?

A I can recall that there was stomach contents and blood, but I don't recall whether there was several blood samples of blood, or just one.

Q I see. And did you do ultra violet photo spectometry tests on these samples of blood, if you recall?

A Yes, sir, that was the nature of the tests.

Q And do you recall, in fact, finding in the blood or the blood samples, any evidence of sodium pentathol?

A As I recall, no.

Q On the calculations that you made in connection with these samples, do you recall that there was any error brought to your attention by Dr. Kutob with regard to your calculations?

A I can't recall that there was, no.

* * *

PRELIMINARY EXAMINATION, Detroit Recorder's Court No. 70-08009, 1970

S. DAVID KUTOB
CROSS EXAMINATION

(100) Q You didn't retain any of the sample?

A I did for -- recently we were cleaning and we discarded the material after two years.

Q When was that specifically?

A I'd have to look over our records, sir, it's recorded down.

Q In other words, if the defendant wanted to have a sample of this, he could not obtain it now, could he?

A No, sir, he could not obtain it now.

Q That protects your findings, doesn't it?

A I don't know what you want explained, sir. We keep them for two years and then after that we discard them.

Q You were new to that department, relatively new?

A Yes.

* * *

Q You had the samples disposed of? You did know there would be a prosecution involved in this, is that correct?

A That's correct.

Q Did you have any particular reason for believing that?

A Well the time factor is a matter of two years.

Q Had you been told by anybody that there would be no prosecution?

(101) A No, sir.

Q Had you been told by anybody that there might be a prosecution at a later date?

A No, sir.

Q Now that Cary Model 15 machine that you used, it does give a reading in molar absorbance, does it not?

A If you prepare the solution correctly, you can sit down and calculate it, yes.

Q But that was calculated in this case, was it?

A I still can do it.

Q But you didn't then, did you?

A No, sir.

Q And there is no way of confirming or disproving your earlier finding, is that correct?

A That's correct, sir.

* * *

MICHIGAN COURT OF APPEALS OPINION

BEFORE: Lesinski, C.J., Danhof and Levin, JJ.

LESINSKI, C.J.

After a jury trial, defendant Ronald Clark, M.D., was convicted of the manslaughter[1] of his patient, Grace Neil. Dr. Clark appeals alleging four instances of error.

Grace Neil died at defendant's medical clinic on November 3, 1967. An autopsy performed the day following her death failed to reveal the cause of death. However, blood and tissue analysis did reveal high concentrations of Sodium Pentothal in the deceased's blood and brain. At trial experts generally agreed that the discovered percentages of the Sodium Pentothal would indicate that death had resulted from too rapid and too excessive infusion of the drug. Other witnesses' testimony indicated that Dr. Clark had left the patient unsupervised during the infusion of the drug. In addition, it was undisputed that the doctor's office did not contain any resuscitative equipment. Finally,

[1] MCLA § 750.321 (Stat Ann 1954 Rev § 28.553).

experts in the medical profession, including general practitioners, toxicologists, anesthesiologists and psychiatrists testified that the defendant's procedure, on the day Grace Neil died, clearly violated accepted medical standards.

Defendant's first allegation of error is that the plaintiff purposely withheld certain information, i.e., the defendant's medical record of treatment of Grace Neil, which would have rebutted the plaintiff's evidence of improper treatment. The testimony of the investigating detective indicates that at the time of arrest, he requested the defendant to surrender the medical record of treatment of Grace Neil and that the defendant complied with this request. At trial the records were referred to in the testimony of witnesses. However, no objection was raised by the defense to such references nor to the fact that the medical records were not produced for the defendant nor admitted in evidence. In this connection we note that defendant admits in his brief that the fact of the medical record seizure was testified to at preliminary examination, six months prior to trial.

Defendant now asserts as he did on motion for new trial, that a request for production of the records was made prior to trial on March 15, 1968. While it does appear from documents filed with our Court that the request for production of these records was made, it would not follow from the fact that the request was not complied with, that the people deliberately withheld or suppressed evidence favorable to the defendant; no evidence showing deliberate withholding or suppression of evidence was offered in support of the motion for new trial.

Since the matter of the production of the medical records was never presented to the trial court for full appraisal, this Court cannot now determine whether there was any basis in fact for the claim that the medical records of treatment were suppressed. Where a defendant relies upon evidence dehors the record to set aside his conviction, the claim and the evidence in support of the claim ordinarily must be presented at the trial level in order to preserve the issue for appeal. People v. Ivy (1968), 11 Mich App 427, 431.

Defendant's second claim of error concerns the sufficiency of the criminal information, filed in this case, which charged that:

> "A licensed physician, did treat one Grace Neil as his patient, and in the said treatment Ronald E. Clark did then and there owe the legal duty of due professional care and caution to Grace Neil, and while so treating the said Grace Neil, Ronald E. Clark did feloniously kill Grace Neil, by his gross and culpable negligence, in that he, the said Ronald E. Clark, did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal, and by so injecting the Sodium Pentothal into the body of Grace Neil, Ronald E. Clark did directly cause the death of Grace Neil, and thus improperly performed and grossly neglected the legal duty that he, as a physician, owed to Grace Neil, and committed Manslaughter, contrary to Section 750.321 of the Compiled Laws of 1948: M.S.A. Section 28.553.".

The crime of involuntary manslaughter is "the killing of another without malice and unintentionally, but in the doing of some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful, in itself, or by the negligent omission to perform a legal duty," People v. Ryczek (1923), 224 Mich 106, 110. The information fully and fairly informed the defendant of the charge against him. (Emphasis supplied.) The information specifically charges the defendant with gross and culpable negligence and then specifically pleads the act which constituted gross negligence. MCLA § 750.321 (Stat Ann 1954 Rev § 28.553).

Defendant next argues that the information failed to advise him of the nature of the evidence to be used against him, i.e., the fact of the lack of available emergency oxygen equipment. Although defendant now claims that he objected at trial to the admission of this evidence, felt to be without the scope of the information, our review of the record fails to disclose any such objection. We will not review matters not properly preserved for appeal. People v. Ivy, supra.

Defendant's fourth allegation of error questions the sufficiency of the evidence to prove knowledge of the extreme risk involved in his conduct. Assuming arguendo that proof of knowledge of the extreme risk involved in the infusion of Sodium Pentothal is necessary for conviction, we find that the plaintiff clearly carried the burden. Expert testimony clearly established that the failure to constantly supervise a patient being infused with Sodium Pentothal was violative of accepted medical standards. Further, testimony established that every medical student and medical doctor was aware or should have been

aware of the precautions required to be taken. The testimony also established that the package containing the Sodium Pentothal also contained manufacturer's instructions detailing the necessary precautions. Finally, the Physicians Desk Reference contained in Dr. Clark's library, details the procedures for use of the drug. According to the totality of the testimony, Dr. Clark did not follow the required procedures when he administered the lethal dose of Sodium Pentothal to Mrs. Neil. Instead, he failed to maintain adequate resuscitative equipment, discarded the manufacturer's instructions, administered the drug without assistance, and left Mrs. Neil alone in the examination room during infusion. We find no error in the proceedings below. There was sufficient evidence, if believed, for the jury to find defendant guilty beyond a reasonable doubt. People v. Williams (1962), 363 Mich 494.

Affirmed.

LIBRARY
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-129

No. 1007

RONALD E. CLARK, M.D.,
Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

INDEX TO BRIEF

	Page
Index to Authorities Cited	iv
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Respondent's Statement of Case	4

Argument:

I. A criminal conviction in a state court does not violate the Fourteenth Amendment to the United States Constitution when said conviction is predicated, in minute part, upon secondary evidence of two documents (the originals being admittedly lost by State Authorities) when Defendant is free on bond a full six months prior to trial and personally makes no attempt to secure said documents, where no proper objection to testimony regarding said documents is raised at trial, and where said documents are but one scintilla of an overwhelming supply of competent evidence of Defendant's guilt..... 6

II. The Fourteenth Amendment to the United States Constitution is not violated in a criminal conviction in a state court when the trial judge allows expert testimony as to a highly sophisticated medical transaction, said expert testimony being predicated on actual evidence found in the trial transcript, and generally received into evidence in the absence of Defendant's objection..... 11

Page

III. The Fourteenth Amendment to the United States Constitution is not violated in a State criminal conviction of Involuntary Manslaughter when Defendant is charged by criminal Information which specifically pleads certain acts of gross negligence, and when the State introduces other competent evidence of Defendant's gross negligence admittedly not specifically plead but which are a part of the res gestae of the crime with which Petitioner is charged 15

Conclusion 17

INDEX TO APPENDIX

1. November 13, 1968, Order of Michigan Court of Appeals denying Petitioner's post-conviction Motion to Produce and for Trial Transcript.. 19

2. June 11, 1969, Order of Michigan Court of Appeals denying Petitioner's Motion for Remand to Trial Court but granting 30 day extension in which to file Brief 20

3. September 28, 1970, Order of Michigan Court of Appeals affirming Petitioner's conviction.. 21

4. January 22, 1971, Order of Michigan Supreme Court denying Petitioner's Application for Leave to Appeal 22

5. Criminal Information upon which Petitioner was tried and convicted 23

		Page
6.	Portion of Direct Examination of Doctor Irwin Posner	24
7.	Portion of Direct Examination of Doctor S. David Kutob	26
8.	Portion of Direct Examination of Doctor Frederic Rieders	29
9.	Portion of Direct Examination of Doctor William E. Gordon	31
10.	Portion of Cross-Examination of Doctor S. David Kutob	32
11.	Portion of Direct Examination of Doctor William E. Gordon	33
12.	Portion of Direct Examination of Doctor Gaylord Alexander	33
13.	Portion of Direct Examination of Doctor Robert Sweet	35
14.	Portion of Direct Examination of Detective Earl Teeples	37
15.	Portion of Direct Examination of Doctor Richard Olsen	38

INDEX TO AUTHORITIES CITED

Cases:	Page
Albertson v. Millard, 345 US 242, 97 L. Ed 983, 73 S. Ct 600 (1953)	15
Beck v. Washington, 369 US 541, 8 L. Ed 2d 98, 82 S. Ct 955 (1962)	8
Brady v. Maryland, 373 US 83 10 L. Ed 2d 215, 83 S. Ct 1194 (1963)	6
Carter v. Illinois, 329 US 173, 91 L. Ed 172, 67 S. Ct. 216 (1946)	10
Chapman v. California, 386 US 18, 17 L. Ed 2d 705, 87 S. Ct 824 (1967)	9
Coleman v. Alabama, 399 US 1, 26 L. Ed 2d 387, 90 S. Ct 1999 (1970)	15
Cramp v. Board of Public Instruction, 368 US 278, 7 L. Ed 2d 285, 82 S. Ct 275 (1961)	16
Giles v. Maryland, 386 US 66, 17 L. Ed 2d 737, 87 S. Ct. 793 (1967)	8
Groppi v. Wisconsin, — US —, 27 L. Ed 2d 571, 91 S. Ct. 490 (1971)	12
Harrington v. California, 395 US 250, 23 L. Ed 2d 284, 89 S. Ct 1726 (1969)	9
Henry v. Mississippi, 379 US 443, 13 L. Ed 2d 408, 85 S. Ct 564 (1965)	8, 9, 15
In Re Lamkin, 355 US 59, 2 L. Ed 2d 107, 78 S. Ct. 137 (1957)	8

	Page
Johnson v. New Jersey, 384 US 719, 14 L. Ed 2d 882, 86 S. Ct 1272 (1966)	15
Kingsley Corp v. Regents of U of N.Y., 360 US 684, 3 L. Ed 2d 1512, 79 S. Ct 1362 (1959)	11
Lawn v. United States, 355 US 339, 2 L. Ed 2d 321, 78 S. Ct 311 (1958)	10
Napue v. Illinois, 360 US 264, 3 L. Ed 2d 1217, 79 S. Ct 1173 (1959)	14
People v. Brocato, 17 Mich App 277, 161 NW 2d 483 (1969)	8
People v. Clark, 384 Mich 801 (1971)	1
People v. Clark, 26 Mich App 475, 182 NW 2d 632 (1970)	1, 7
People v. Farmer, 380 Mich 198, 156 NW 2d 504 (1968)	7
People v. Keiswetter, 7 Mich App 334, 151 NW 2d 829 (1967)	12, 14, 16
People v. Layman, 299 Mich 141, 299 NW 840 (1941)	12
People v. Maranian, 359 Mich 361, 102 NW 2d 568 (1960)	8
People v. Omacht, 326 Mich 505, 40 NW 2d 704 (1950)	15
People v. Orr, 243 Mich 300, 220 NW 777 (1928)	12, 14
People v. Robertson, 301 Mich 100, 3 NW 2d 26 (1942)	15
People v. Rosa, 268 Mich 462, 256 NW 483 (1934)	15

Page

People v. Ryczek, 224 Mich 106, 194 NW 609 (1923) 16

People v. Shirk, 383 Mich 180, 174 NW 2d 772 (1970) 8

Russell v. Southard, 53 US 139, 13 L. Ed 927,12 How 139 (1851) 10

Street v. New York, 394 US 576, 22 L. Ed 2d 572, 89 S. Ct 1354 (1969) 16

Thompson v. City of Louisville, 362 U.S. 199, 4 L. Ed 2d 654, 80 S. Ct 624 (1960) 11

Watts v. Indiana, 338 US 49, 93 L. Ed 1801, 69 S. Ct 1804 (1948) 14

Wolfe v. North Carolina, 364 US 177, 4 L. Ed 2d 1650, 80 S. Ct 1482 (1960) 14, 15, 16

Statutes:

28 USC §1257(3) 2

MCLA §750.321 (Stat Ann 1954 Rev. §28.553) .. 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1607

RONALD E. CLARK, M.D.,
Petitioner,

vs.

PEOPLE OF THE STATE OF MICHIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Opinion of Division One, Michigan Court of Appeals, is reported at *People v. Clark*, 26 Mich App 475, 182 NW 2d 632 (1970). The Michigan Supreme Court's denial of discretionary leave to appeal is reported at *People v. Clark*, 384 Mich 801 (1971).

JURISDICTION

Respondent denies that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3) because this Petition for Certiorari does not present a substantial Federal question.

QUESTIONS PRESENTED

I. Whether a criminal conviction in a State Court violates the Fourteenth Amendment to the United States Constitution when said conviction is predicated, in part, upon secondary evidence of two documents (the originals being lost by State Authorities) when Defendant is free on bond a full six months prior to trial and personally makes no attempt to secure said documents, where no proper objection to testimony regarding said documents is raised at trial and where said documents are but one scintilla of an overwhelming supply of competent evidence of Defendant's guilt?

> The trial court was not asked to pass upon this question at trial.
> The Michigan Court of Appeals said "No."
> The Michigan Supreme Court felt the matter to be so insignificant that it denied discretionary review.
> Respondent believes the answer is "No."

II. Whether the Fourteenth Amendment to the United States Constitution is violated in a criminal conviction in a State Court where the trial judge allows expert testimony as to a highly sophisticated medical transaction, said expert testimony being predicated on actual evidence found

in the trial transcript, and generally received into evidence in the absence of Defendant's objection?

The trial court was not asked to answer this question at all during trial and when asked to answer one portion of it, it was too late pursuant to Michigan law.

The Michigan Court of Appeals was not asked to pass upon this question.

The Michigan Supreme Court felt the matter to be so insignificant that it denied discretionary review.

Respondent believes the answer is "No."

III. Whether the Fourteenth Amendment to the United States Constitution is violated when, in a State criminal conviction of Involuntary Manslaughter, in which Defendant is charged by Information which specifically pleads certain acts of gross negligence, the State introduces other evidence of Defendant's gross negligence admittedly not specifically plead but which, are a part of the *res gestae* of the crime with which he is charged?

The trial court was not asked to answer this precise question.

The Michigan Court of Appeals answered this question "No."

The Michigan Supreme Court felt the matter to be so insignificant that it denied discretionary review.

Respondent believes the answer is "No."

RESPONDENT'S STATEMENT OF CASE

(All numbers found in parentheses and preceded by the prefix "R" refer to the corresponding pages of the trial transcript.)

The instant Petition treats a Michigan criminal prosecution of Ronald E. Clark, M.D., for the crime of Involuntary Manslaughter in violation of Michigan Compiled Laws Annotated §750.320 (Stat Ann 1954 Rev. §28.553). Petitioner was convicted by jury on June 28, 1968 (R. 523), and subsequently sentenced to serve not less than three (3) nor more than fifteen (15) years under the jurisdiction of the Michigan Department of Corrections. Petitioner's Motion for a New Trial was subsequently denied by the trial judge. Petitioner's appeal as a matter of Constitutional Right (Art. I, §20 of 1963 Michigan Constitution) was duly heard by a panel of three judges of Division One, Michigan Court of Appeals, and on September 28, 1970, was unanimously determined adversely to Petitioner. On January 22, 1971, the Michigan Supreme Court unanimously denied the Petitioner's request for discretionary review (22). Petitioner has been incarcerated since the date that the jury returned the verdict (R. 525).

Interspersed between Petitioner's jury conviction, and its affirmation by the Michigan Court of Appeals, Petitioner filed several motions in the Court of Appeals requesting that certain specimens of the decedent's body, organs, blood be given Petitioner for independent scientific examination. These motions were vigorously resisted by the Prosecution for several reasons: (1) The proper forum for initially raising such issue was before the trial court, (2) That the motions were not properly preserved inasmuch as Petitioner had now been convicted by jury and the time to consider such matter had passed, and (3)

That the Michigan General Court Rules do not provide for discovery in criminal cases [GCR 1963, 785.1(2)]. Furthermore, it is essential to note that the record clearly emasculates Petitioner's request inasmuch as it is clear that, *prior to trial*, the Prosecution did, in fact, make every specimen available to the defense for the latter's independent scientific examination (R. 329-30) (See, also, Pg. 7, of Petitioner's Brief for an admission of such fact).

At trial there was competent testimony that Petitioner, a licensed medical doctor, had stated that he was treating the deceased for obesity (R. 73, 74), high blood pressure (R. 74, 113) and heart disease (R. 74, 113) by utilizing Sodium Pentothal as a therapeutic medication. A formidable array of qualified medical experts testified that Sodium Pentothal has no recognized therapeutic value in medicine (R. 79, 128, 150, 156-57, 240) and the results of decedent's autopsy amply illustrated that she had no heart disease (R. 37, 38), no high blood pressure and was of average weight(R. 38). As a matter of fact, a board certified anesthesiologist testified that Sodium Pentothal is medically *contraindicated* (R. 151) when one has heart disease.

Doctor William E. Gordon, a board certified psychiatrist testified that, from a psychiatric point of view, Sodium Pentothal is contraindicated in cases of obesity (R. 270-71). Two qualified toxicologists testified that the quantity of Sodium Pentothal in decedent was excessive (R. 46, 123) and Doctor Gordon, the psychiatrist, testified that the amount of Sodium Pentothal found in decedent was "completely unheard of" because it was so excessive (R. 269).

Predicated on the above testimony, and other physical and verbal evidence, Petitioner was quickly found guilty by a jury of his peers.

Through all stages of the proceedings of the proceedings Petitioner was represented by able counsel. A Motion for Change of Venue was granted by the trial judge and several of Petitioner's Motions for Adjournment were granted in order to allow the Defendant additional time for trial preparation. Petitioner was free on bond for approximately six months prior to trial.

ARGUMENT

I.

A CRIMINAL CONVICTION IN A STATE COURT DOES NOT VIOLATE THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN SAID CONVICTION IS PREDICATED, IN MINUTE PART, UPON SECONDARY EVIDENCE OF TWO DOCUMENTS (THE ORIGINALS BEING ADMITTEDLY LOST BY STATE AUTHORITIES) WHEN DEFENDANT IS FREE ON BOND A FULL SIX MONTHS PRIOR TO TRIAL AND PERSONALLY MAKES NO ATTEMPT TO SECURE SAID DOCUMENTS, WHERE NO PROPER OBJECTION TO TESTIMONY REGARDING SAID DOCUMENTS IS RAISED AT TRIAL, AND WHERE SAID DOCUMENTS ARE BUT ONE SCINTILLA OF AN OVERWHELMING SUPPLY OF COMPETENT EVIDENCE OF DEFENDANT'S GUILT.

There simply can be no question that "suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material . . . to guilt . . . irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland,* 373 US 83, 87, 10 L. Ed 2d 215, 218, 83 S. Ct 1194 (1963). Petitioner is incorrect when he states that "Bad faith by the prosecution seems to be at the bottom of the rule" (Petitioner's Brief, Pg. 12) inasmuch as *Brady* indicates the reason for suppression is

immaterial if, in fact, the evidence was material to Petitioner's guilt or innocence. Respondent has never denied that this legal principle governs; however, Respondent has always contended that there is *no factual suppression* in this case.

The Michigan Court of Appeals did not, as Petitioner would have this Court believe, answer his stated question in the negative. That Court did consider whether the State suppressed documents favorable to Petitioner and held against him because there was no factual showing of suppression. Chief Judge Lesinski wrote:

> "Defendant now asserts, as he did on motion for new trial, that a request for production of the records was made prior to trial on March 15, 1968. While it does appear from documents filed with our Court that the request for production of these records was made, it would not follow from the fact that the request was not complied with, that the people deliberately withheld or suppressed evidence favorable to the defendant; no evidence showing deliberate withholding or suppression of evidence was offered in support of the motion for new trial.
>
> Since the matter of the production of the medical records was never presented to the trial court for full appraisal, this Court cannot now determine whether there was any basis in fact for the claim that the medical records of treatment were suppressed. Where a defendant relies upon evidence *dehors* the record to set aside his conviction, the claim and the evidence in support of the claim ordinarily must be presented at the trial level in order to preserve the issue for appeal. (Emphasis original.)
>
> *People v. Clark*, 26 Mich App. at 478.

It is the general rule in Michigan that matters not objected to during trial are not properly preserved for appellate review. *People v. Farmer*, 380 Mich 198, 156 NW 2d

504 (1968); *People v. Shirk,* 383 Mich 180, 174 NW 2d 772 (1970). Such practice is apparently common in most states and certainly not inconsistent with rulings of this Court. See *Henry v. Mississippi,* 379 US 443, 13 L. Ed 2d 408, 85 S. Ct 564 (1965); *Beck v. Washington,* 369 US 541, 8 L. Ed 2d 98, 82 S. Ct 955 (1962); *In Re Lamkin,* 355 US 59, 2 L. Ed 2d 107, 78 S. Ct 137 (1957). At most, this Court, if it accepts all of Petitioner's claims as being valid (which they certainly are not), would remand to the state court for a hearing. *Henry v. Mississippi, supra; Giles v. Maryland,* 386 US 66, 17 L. Ed 2d 737, 87 S. Ct 793 (1967). While it does not appear anywhere in the trial transcript, the certified record of this matter should contain copies of letters, orders, etc. from the Michigan Court of Appeals to Respondent's counsel to furnish that Court with copies of all relevant documents and records in the State's possession. This was done with the exception of the two lost treatment cards. Thus, in a sense, Petitioner has had his remand to the state courts.

Petitioner was aware that these medical records were in the custody of State officials a full six months prior to trial. (See, Opinion of Michigan Court of Appeals, Petitioner's Brief, Pg. 37a). While it is true that his counsel requested that Respondent provide the form with said teratment cards, and that these treatment cards were reportedly lost and not, in fact, provided Petitioner, the matter was never properly raised prior to jury verdict. Michigan law provides a procedure for raising such questions *prior* to trial. *People v. Maranian,* 359 Mich 361, 102 NW 2d 568 (1960); *People v. Brocato,* 17 Mich App 277, 169 NW 2d 483 (1969). This procedure was not followed. Respondent does not believe that this Court will hold that Michigan's well-reasoned rule that in order to properly preserve such matters for appeal the alleged impropriety

should be raised prior to trial, before the trial judge and by written motion, does not serve a "legitimate state interest." *Henry v. Mississippi*, 379 US at 448, 13 L. Ed 2d at 413.

Finally, Respondent points out that failure to produce these treatment cards was harmless error beyond a reasonable doubt. *Chapman v. California*, 386 US 18, 17 L. Ed 2d 705, 87 S. Ct 824 (1967); *Harrington v. California*, 395 US 250, 23 L. Ed 2d 284, 89 S. Ct 1726 (1969). The Statement of the Case set out in the beginning of this Brief, and the facts found in the Michigan Court of Appeals Opinion, clearly show that Petitioner's conviction had little if anything to do with non-production of treatment cards.

In the state courts Petitioner illustrated a disturbing propensity to resort to personal invective and to matters not contained in the record. His "Statement of the Case," for example, (Petitioner's Brief, Pg. 2-3) is not supported at all by any *testimony* in the record but only by his attorney's opening statement. A party's opening statement is simply not probative evidence. Furthermore, the non-sequiter found at Pg. 5 of Petitioner's Brief, treating the trial judge's handling of a Diathermy Burn case involving a Judgment with a "blank line for the amount," is slander foreign to this record. Probably it is also false but because it is not contained within the record, Respondent can only judge the statement's veracity by the character of its author.

Petitioner's statement that the defense expert, Doctor Roy Aston, examined the deceased's body organs and determined that "no (Sodium) Pentothal was present in appreciable quantities" (Petitioner's Brief, Pg. 7) does not find factual support in this record. Petitioner cites this Court to an administrative hearing held *subsequent* to his

Manslaughter conviction (See PP. 31a-34a). Petitioner does admit that "the defense (did have) an opportunity to have an independent expert examine the body organs for Pentothal" prior to trial but that "his testimony was not used by the defense . . ." (Petitioner's Brief, Pg. 7). One must ask why the Petitioner did not call Doctor Aston at trial? The material found at pages 1a, 2a, 3a, 4a (partially), 12a, 31a, 32a, 33a, 34a, 35a and 36a (partially) are not portions of the record in this matter and have no proper place in Petitioner's Brief.

Respondent understands the Michigan rule of review to be compatible with decisions of this Court, to-wit: the Court reviews only material found in the record. *Carter v. Illinois*, 329 US 173, 91 L. Ed 172, 67 S. Ct 216 (1946); *Lawn v. United States*, 355 US 339, 2 L. Ed 2d 321, 78 S. Ct 311 (1958); *Russell v. Southard*, 53 US 139, 13 L. Ed 927, 12 How 139 (1851).

Petitioner's first question is so lacking in merit and factual support as to be totally unworthy of this Court's consideration.

II.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT VIOLATED IN A CRIMINAL CONVICTION IN A STATE COURT WHEN THE TRIAL JUDGE ALLOWS EXPERT TESTIMONY AS TO A HIGHLY SOPHISTICATED MEDICAL TRANSACTION, SAID EXPERT TESTIMONY BEING PREDICATED ON ACTUAL EVIDENCE FOUND IN THE TRIAL TRANSCRIPT, AND GENERALLY RECEIVED INTO EVIDENCE IN THE ABSENCE OF DEFENDANT'S OBJECTION.

The second question presented by Petitioner is again not supported by the record and, more importantly, inundated by subjective and erroneous conclusions of Petitioner's counsel.

Thompson v. City of Louisville, 362 US 199, 4 L. Ed 2d 654, 80 S. Ct 624 (1960), does indeed stand for the proposition that to convict an accused of a crime which has no evidentiary support is a violation of the Fourteenth Amendment. Recognizing this principal, Respondent is at a loss to ascertain how *Thompson* applies in this case.

Petitioner was charged with Involuntary Manslaughter. The applicable Michigan statute reads as follows:

> "Any person who shall commit the crime of manslaughter shall be guilty of a felony punishable by imprisonment in the state prison, not more than 15 years or by fine of not more than $7,500 dollars, or both, at the discretion of the court."
>
> MCLA §750.321.

It is settled constitutional law that this Court must accept the construction of a state statute as the state courts have construed the legislative enactment. *Kingsley Corp. v. Regents of U of N.Y.*, 360 US 684, 3 L. Ed 2d 1512, 79 S.

Ct 1362 (1959; *Groppi v. Wisconsin,* — US —, 27 L. Ed 2d 571, 91 S. Ct 490 (1971).

In *People v. Orr,* 243 Mich 300, 220 NW 777 (1928), the Michigan Supreme Court identified three elements necessary to establish Involuntary Manslaughter:

> (1) Knowledge of a situation requiring the exercise of ordinary care and diligence to overt injury to another;
>
> (2) Ability to avoid the resulting harm by ordinary care and diligence in the use of the means at hand;
>
> (3) The omission to use such care and diligence to avert the threatened danger when to the ordinary mind it must be apparent that the result is likely to prove disastrous to another.
>
> 243 Mich at 305.

See, also, *People v. Layman,* 299 Mich 141, 299 NW 840 (1941); *People v. Keiswetter,* 7 Mich App 334, 151 NW 2d 829 (1967). Petitioner's claim that a licensed medical doctor, who infuses a patient with a medically unheard of dose of Sodium Pentothal (32), for a non-existing ailment (38-39) and leaves her unattended while the Sodium Pentothal is dripping into her arm (85) does not satisfy all the elements of Involuntary Manslaughter in Michigan is incredible. The testimony of Detective Sergeant Earl Teeples as set out at pages 16 and 17 of Petitioner's Brief support the factual inference that Petitioner had infused the deceased with Sodium Pentothal and left her unattended —notwithstanding Detective Teeples cross-examination which also *included* the following:

> "Q. Did Mr. Clark explain to you the procedure he followed that evening in administering Sodium Pentothal to Mrs. Neil?

A. *Yes; he said that he had started the drip treatment of Sodium Pentothal in this treatment room, and started the treatment, then went away and into another part of the building and closed the door, and left her in there alone.*

Q. Did he tell you how long he had remained there with her before he left the room?

A. I don't remember—I don't think he did. I don't recall him saying.

Q. Did he tell you how long this treatment required?

A. He said sometimes it would take half an hour and sometimes it would take an hour, depending on how fast it dripped.

Q. Did he say anything about leaving after the Sodium Pentothal had been absorbed into the body of Grace Neil?

A. Leaving the room?

Q. After she had absorbed it.

A. No, sir. He told me the treatment was going on and that he had checked it a couple of times, and that he had asked Mrs. Clark to check and see if it was still going or if it had completely dripped into her, and she had gone in to check and found that Mrs. Neil was dead." (Emphasis added.) (110-111).

The gist of Petitioner's conviction was not "the absence of Petitioner from the treatment room while his patient was being infused with a dangerous drug" (Petitioner's Brief, Pg. 18). The *gist* of the offense was, in the words of the Criminal Information, that Petitioner "did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal and by so injecting the Sodium Pentothal into the body of Grace Neil, Ronald E. Clark did directly cause the death of Grace Neil, and thus improperly performed and grossely neglected the legal duty that he, as a physician, owed to Grace Neil" (See Criminal Information set out in full at Pg. 23 of Respondent's Appendix).

That there was competent testimony to substantiate this charge cannot be gainsaid by Petitioner (See, e.g. Pgs 46 and 123 of Trial Record). It is clear that the People charged and proved all elements of Involuntary Manslaughter as set forth in *People v. Orr, supra.* It is the law in Michigan that in a trial for Involuntary Manslaughter, additional acts of Petitioner's negligence are competent evidence, even if not specifically pleaded in the Criminal Information, if they are part of the *res gestae* of the offense. *People v. Keiswetter, supra.* Such was the case here.

What Petitioner is really asking this Court to do is to undertake a review of a State's Court's factual finding. Respondent concedes this Court's right to make an independent factual examination when the disputed facts concern a federal constitutional issue [*Napue v. Illinois,* 360 US 264, 3 L. Ed 2d 1217, 79 S. Ct 1173 (1959)], but here the real question is not one of federal constitutional law because assuming, *arguendo,* that even if Petitioner is correct that Respondent failed utterly in introducing any competent evidence that Petitioner left deceased unattended when she was being infused with Sodium Pentothal, *Thompson* would not require reversal since there is still competent testimony on each and every element of Involuntary Manslaughter pursuant to Michigan law. The Opinion of the Michigan Court of Appeals expressly found competent evidence that Petitioner infused his patient, Grace Neil, the deceased, with excessive amounts of Sodium Pentothal (See, Pg. 36a of Petitioner's Brief). Respondent understands the law to be that this Court will not reexamine a State Court's finding and conclusions of fact. *Watts v. Indiana,* 338 US 49, 93 L. Ed 1801, 69 S. Ct 1804 (1948); *Wolfe v. North Carolina,* 364 US 177, 196, 4 L. Ed 2d 1650, 80 S. Ct 1482 (1960).

Finally, Respondent respectfully points out that the alleged mis-quotation of fact during the Prosecutor's closing argument (Petitioner's Brief, Pg. 15) was received without objection by defense counsel. The Michigan Supreme Court has consistently ruled that a Defendant who fails to object to the Prosecuting Attorney's argument in the trial court is precluded from raising such alleged error on appeal. *People v. Rosa,* 268 Mich 462, 466, 256 NW 483 (1934); *People v. Robertson,* 301 Mich 100, 106, 3 NW 2d 26 (1942); *People v. Omacht,* 326 Mich 505, 511-14, 40 NW 2d 704 (1950). Respondent submits that Michigan's procedural rule of requiring objection in the trial court in order to save the issue for appellate review squares with *Henry v. Mississippi, supra.* See, also *Wolfe v. North Carolina, supra* at 195; *Johnson v. New Jersey,* 384 US 719, 735, 14 L. Ed 2d 882, 893, 86 S. Ct 1272 (1966).

III.

THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION IS NOT VIOLATED IN A STATE CRIMINAL CONVICTION OF INVOLUNTARY MANSLAUGHTER WHEN DEFENDANT IS CHARGED BY CRIMINAL INFORMATION WHICH SPECIFICALLY PLEADS CERTAIN ACTS OF GROSS NEGLIGENCE, AND WHEN THE STATE INTRODUCES OTHER COMPETENT EVIDENCE OF DEFENDANT'S GROSS NEGLIGENCE ADMITTEDLY NOT SPECIFICALLY PLEAD BUT WHICH ARE A PART OF THE RES GESTAE OF THE CRIME WITH WHICH PETITIONER IS CHARGED.

Petitioner's request that this Court interpret the substantive law of Manslaughter in the State of Michigan is certainly jurisdictionally improper. *Coleman v. Alabama,* 399 US 1, 9, 26 L. Ed 2d 387, 396, 90 S. Ct 1999 (1970); *Albertson v. Millard,* 345 US 242, 97 L. Ed 983, 73 S. Ct 600 (1953).

Even if Petitioner's allegation that the instant Criminal Information was somehow deficient from a due process standpoint was correct (which it is not), this Court's jurisdiction would not be properly invoked. Petitioner's conviction on the Involuntary Manslaughter Information is clearly valid under Michigan law. *People v. Ryczek*, 224 Mich 106, 194 NW 609 (1923); *People v. Keiswetter, supra.* Thus, Petitioner's conviction independently rests on a valid state ground. And it is

> "The settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment."
>
> *Cramp v. Board of Public Instruction,* 368 US 278, 281, 7 L. Ed 2d 285, 288, 82 S. Ct 275 (1961).

Wolfe v. North Carolina, 364 US 177, 4 L. Ed 2d 1650, 80 S. Ct 1482 (1960), precludes review of this issue by this Court because the Michigan Court of Appeals decided the matter squarely on state grounds. Thus, no federal question is here presented and jurisdictional reliance on 28 USC §1257(3) is misplaced. Furthermore, the Michigan Supreme Court denied Petitioner's request for Leave to Appeal. ". . . When, as here, the highest state court has failed to pass upon a(n) (alleged) federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party can affirmatively show the contrary." *Street v. New York,* 394 US 576, 582, 22 L. Ed 2d 572, 89 S. Ct 1354 (1969). Not only was the alleged *constitutional* error not passed upon by the Michigan Supreme Court, but the Michigan Court of Appeals did not review the alleged *constitutional* error and Petitioner never presented the alleged constitutional error to the trial court.

CONCLUSION

This Petition for Writ of Certiorari presents no question worthy of this Court's attention. The questions advanced treat matters outside the settled record which are flagrantly improper. The Petition is devoid of a substantial federal question. The issues claimed have all been previously answered by this Court. The facts of this case simply do not apply to the settled legal issues relied upon by the Petitioner.

The State of Michigan is confident that this Court will find that Petitioner was free to exercise every legal right he possessed. He was convicted of a crime he committed, pursuant to a fair trial before an impartial jury in which he enjoyed the effective assistance of counsel.

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari be denied.

Respectfully submitted,

BRUCE T. LEITMAN
Counsel for Respondent
1263 West Square Lake Road
Bloomfield Hills, Michigan 48013
(313) 335-9431

Dated: June —, 1971

APPENDIX

NOVEMBER 13, 1968, ORDER OF MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 13th day of November in the year of our Lord one thousand nine hundred and sixty-eight.

Present the Honorable Thomas Giles Kavanagh, Presiding Judge; Louis D. McGregor, Timothy C. Quinn, Judges.

In this cause a motion to produce and a motion for trial transcript are filed by defendant-appellant and answers in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that the motions to produce and for trial transcript be, and the same are hereby Denied.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 14th day of November in the year of our Lord one thousand nine hundred and sixty-eight.

/s/ Ronald Dzierbicki
Clerk

(Seal)

JUNE 11, 1969, ORDER OF MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Lansing, on the 11th day of June in the year of our Lord one thousand nine hundred and sixty-nine.

Present the Honorable Louis D. McGregor, Presiding Judge; Robert J. Danhof, T. John Lesinski, Judges.

In this cause a motion to remand has been filed by appellant and an answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

It is Ordered that the motion to remand, be and the same is hereby Denied.

It is Further Ordered that appellant be granted an extension of thirty days in which to file his brief.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 13th day of June in the year of our Lord one thousand nine hundred and sixty-nine.

/s/ Ronald L. Dzierbicki

(Seal) Clerk.

SEPTEMBER 28, 1970, ORDER OF THE MICHIGAN COURT OF APPEALS

At a Session of the Court of Appeals of the State of Michigan, Held at the Court of Appeals in the City of Detroit, on the 28th day of September in the year of our Lord one thousand nine hundred and seventy.

Present the Honorable T. John Lesinski, Presiding Judge; Charles L. Levin, Robert J. Danhof, Judges.

This cause having been brought to this Court by appeal from Oakland County Circuit Court, and having been argued by counsel, and due deliberation had thereon, it is now ordered by the Court that, the judgment of the Oakland County Circuit Court be and the same is hereby affirmed.

State of Michigan—ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 20th day of October in the year of our Lord one thousand nine hundred and seventy.

/s/ Ronald L. Dzierbicki,
Clerk

(Seal)

JANUARY 22, 1971, ORDER OF MICHIGAN SUPREME COURT

At a Session of the Supreme Court of the State of Michigan, Held at the Supreme Court Room, in the City of Lansing, on the 22nd day of January in the year of our Lord one thousand nine hundred and seventy-one.

Present the Honorable Thomas M. Kavanagh, Chief Justice, Eugene F. Black, Paul L. Adams, Thomas E. Brennan, Thomas G. Kavanagh, John B. Swainson, G. Mennen Williams, Associate Justices.

On order of the Court, the application for leave to appeal is considered, and the same is hereby Denied, for the reasons that defendant and appellant has failed to persuade the Court that he has a meritorious basis for appeal or that the decision of the Court of Appeals was clearly erroneous.

State of Michigan—ss.

I, Donald F. Winters, Clerk of the Supreme Court of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Supreme Court at Lansing, this 22nd day of January in the year of our Lord one thousand nine hundred and seventy-one.

/s/ Donald F. Winters,
Clerk.

(Seal)

CRIMINAL INFORMATION

State of Michigan,
County of Oakland—ss. The Circuit Court for the County of Oakland

In the Name of the People of the State of Michigan, S. Jerome Bronson, Prosecuting Attorney in and for said County of Oakland, who prosecutes for and on behalf of the People of the said State in said Court, comes now here in said Court in the November term thereof, A. D. 1967, and gives the said Court to understand and be informed that Ronald E. Clark, M.D. late of the Twp. of Farmington in said County, heretofore, to-wit, on the 3rd day of November A. D. 1967 at the said Twp. of Farmington in said County, a licensed physician, did treat one Grace Neil as his patient, and in the said treatment Ronald E. Clark did then and there owe the legal duty of due professional care and caution to Grace Neil, and while so treating the said Grace Neil, Ronald E. Clark did feloniously kill Grace Neil, by his gross and culpable negligence, in that he, the said Ronald E. Clark, did inject into the body of Grace Neil an excessive quantity of Sodium Pentothal, and by so injecting the Sodium Pentothal into the body of Grace Neil, Ronald E. Clark did directly cause the death of Grace Neil, and thus improperly performed and grossly neglected the legal duty that he, as a physician owed to Grace Neil, and committed Manslaughter, contrary to Section 750.321 of the Compiled Laws of 1948: M.S.A Section 28.553. (*Maximum penalty—15 years*) contrary to the form of the Statute in such case made

and provided, and against the peace and dignity of the People of the State of Michigan.

S. Jerome Bronson
By: Ronald E. Covault
Assistant Prosecuting Attorney

(List of Witnesses followed on the reverse side.)

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

* * * * *

(67) POSNER, IRWIN B., being first duly sworn, testified as follows:

Direct Examination

By Mr. Leitman:

* * * * *

(73) Q. * * * What was the nature of this conversation you had with Dr. Clark, Doctor?

A. I asked Dr. Clark if he could tell me of some of the events that led up to the death of his patient.

Q. Did you specifically ask him why he was treating Mrs. Neil, for what symptoms, what diseases?

A. I did.

Q. What, if anything, did he say?

A. He said that he was treating her for heart disease, hyper- (74) tension—which is high blood pressure—and obsesity, which is overweight.

Q. I see.

Now, did you ask or did you have an opportunity to observe his medical records regarding Grace Neil?

A. I did.

Q. Now, what, if anything, unusual did you notice on them?

A. I noticed a figure of one hundred and seventy.

Q. One hundred and seventy.

A. Yes, sir.

Q. Do you know what that figure meant?

A. I asked Dr. Clark, and he said that was the weight of the patient.

Q. Now, this was on Mrs. Grace Neil's medical chart, is that correct, or records?

A. Yes, sir.

Q. The figure one seventy?

A. Yes, sir.

Q. And he said that was her weight?

A. Yes, sir.

Q. What did you say, if anything, in response to that?

A. I said that Mrs. Neil didn't look like she weighed more than one twenty to one hundred twenty-five pounds.

Q. What, if anything, did he say in response to that?

A. And he said no, on second thought, that wasn't her weight, (75) that was his own weight.

Q. That was his weight?

A. Yes, sir.

Q. Of one hundred seventy pounds, on her medical record?

A. Yes, sir.

Q. Doctor, in your practice as a physician and surgeon, did you ever have an opportunity to put your own personal statistics or characteristics on your patients' medical records?

A. No, sir.

Q. Did you know of any physician who does this?

A. No, sir.

Q. Did you have an opportunity to ascertain from Dr. Clark how much Sodium Pentothal he had administered to Grace Neil?

* * * * *

(39) KUTOB, S. DAVID, being first duly sworn, testified as follows:

(40) *Direct Examination*

By Mr. Bain:

* * * * *

(46) Q. (By Mr. Bain): Would you tell us how you arrived at that conclusion, Doctor?

A. The fact that no pathology has been found, the fact that Dr. Olsen indicated that the subject has been in a normal healthy condition and the fact that there is a concentration of thiopental in the blood above, beyond and above, general anesthetic concentration which in my opinion is competent with lethal doses.

Q. And what was your opinion as to the cause of death?

A. The effect or overdose of Sodium Pentothal.

Q. Doctor, after you ran the test on the blood, did you have occasion to run any other tests on any other portions of the body that had been submitted to you?

A. Recently, I did; as a matter of fact, last week.

Q. And what portion of the body did you have occasion to examine at that time or to analyze?

A. The brain.

Q. And how was that test conducted?

A. It is in a very similar manner to the test I ran on the blood.

Q. What do you use, Doctor, to conduct the test? What portion (47) of the test was the fluid or solid portion?

A. Well, in this case, I took the whole specimen of brain supplied by the autopsy. And the modification and methodology was to—since everybody is familiar with the brain, how it looks like, it is a semi-solid material—in order to succeed in extracting it, it is necessary to homogenize

it and take the homogenate and extract it, exactly using the method I used on blood.

Q. And, Doctor, what were the results of the examination of the brain matter?

A. The result, the brain showed the presence of sodium thiopental in a concentration of 17.1 milligram per hundred grams of brain.

Q. Doctor, when you say, "sodium thiopental," is that another name for Sodium Pentothal?

A. Sodium Pentothal and sodium thiopental are synonymous.

Q. Doctor, for the jury's and my sake, could you explain why the concentration of Sodium Pentothal in the brain would be so much higher than that in the blood?

A. Sodium Pentothal is a drug that has a great affinity to distribute itself in fat or lipid material. Now, the brain has a higher concentration of fat than does the blood. And for this reason, it tends to concentrate itself in the fatty material of the brain. And for this reason, I find that there is much higher concentration in the brain than I did find in the blood.

(48) Q. Doctor, in the case of the death due to an overdoes of Sodium Pentothal, what actually causes the death in terms of the body functions?

A. Well, it is generally believed that death is due to circulatory collapse. However, cases studied in which death was as a result of Sodium Pentothal showed to a second degree that a cardiac failure is another cause for death. And a third possibility is respiratory failure.

In this case, I don't know which came first.

Q. Doctor, which basic group or general group of drugs does Sodium Pentothal belong to?

A. It belongs to the group we classify as barbiturates.

Q. And how many times have you had occasion to make examinations for this family of drugs?

A. Well, without—we are receiving at least two or three cases a week. So, since 1966, it is a little bit complicated to calculate. But the average, two to three cases, I screen for bartiturates.

Q. How often in that period of time have you found specifically the drug Sodium Pentothal?

A. None in tissue, I recall.

Q. Now, other than the drug Sodium Pentothal, or thiopental, was there any other foreign substance in Grace Neil's blood?

A. I failed to detect the prlesence of any other substance in Grace Neil's blood.

(49) Q. Did you detect any other substance in that portion of her brain which you had occasion to examine?

A. I failed to detect any other substance in the brain, either.

Q. Have you ever had occasion to publish any articles on barbiturates, Doctor?

A. Research that involved the use of barbiturates, yes.

Q. Now, is there such a thing that a person who is administered Sodium Pentothal, for example, over a long period of time or a period of time, would build up a tolerance to it?

A. Well, sir, we have to define what you mean by "tolerance" here. If you mean that increase, you have to increase the dose in order to sedate or cause hypnosis in a person, yes. But there is no tolerance to a lethal dose in normal individuals that I know of.

Q. Briefly stated, then, it might take more to put me asleep but the limit for my death would remain the same?

A. Would remain the same.

Q. Doctor, did you have occasion to check the blood type of Mrs. Neil?

A. No, sir, I haven't; I didn't do it.

Q. Do you know whether or not that blood type was checked?

A. It was checked.

Q. Are there any studies available regarding Sodium Pentothal, professionally published studies?

A. Studies, yes. But it depends on what you mean by —what kind of studies do you have—

(50) Q. Experiments, so to speak.

A. Experimentation, yes.

Q. Would that be experimentation or human beings or on animals?

A. Mostly on animals; and there are some studies on human beings, too.

* * * * *

(117) RIEDERS, DOCTOR FREDERIC, being first duly sworn testified as follows:

Direct Examination

By Mr. Bain:

* * * * *

(122) Q. As you know, Doctor, the testimony has revealed that Grace Neil died approximately at 8:00 o'clock, or within an hour one way or the other, on the evening of November 3. The next morning, an autopsy was performed on her body by Dr. Olsen and Dr. Olsen could find no cause of death that was due to any disease or any injury.

Subsequent to that time, a toxicological examination was conducted by Dr. Kutob; and in the course of that examination, he found that the blood of Grace Neil contained 3.1 milligrams percent of Sodium Pentothal, and that the brain tissue that he examined contained 17.1 percent milligrams of Sodium Pentothal.

The testimony has also revealed that Grave Neil weighed approximately one hundred and twenty-five pounds.

Based on these facts, are you able to form an opinion as to the cause of Grace Neil's death?

A. Yes, I can.

Q. And what is that opinion, Doctor?

(123) A. It is my opinion, on the basis of what you have told me and what I know from my discussion with Dr. Kutob, which is essentially the same, that Grace Neil died of Pentothal poisoning resulting from the administration of Pentothal Sodium in too large a dose and too rapidly, both. That means she died rather quickly in the course of the administration of a large dose or fairly rapid administration of a large dose of Pentothal. Based on these concentrations, I am reasonably sure of that. And I am also reasonably sure that the quantity that was in her body at the time of her death was in excess of one and somewhere between one and two grams of Pentothal.

Q. Doctor, could you tell the jury what, if any, is the significance of the fact that the blood contained 3.1 milligrams percent and the brain tissue examined by Dr. Kutob contained 17.1 milligrams percent?

A. Well, there are several significant points to this. First of all, the level of 3.1 milligrams—or roughly 3 milligrams—is one which is entirely high enough to be in and of itself the cause of death.

The brain level is extremely high and indicates—this ratio between blood and brain—and indicates that the drug went in rapidly and went in in large quantities, rapidly into circulation and was very quickly picked up by the brain and quickly built up to this level at which point I guess she died—at which she did die—(124) and which the uptake stopped. The brain sucks Pentothal up out of the blood as it goes in very quickly. This is why a person goes under so quickly with Pentothal. So that the ratio is an indication of the speed and massive dose that went in.

Q. And from the percentages that we have discussed in Grace Neil's body weight, Doctor, did you indicate that you were able to arrive at an opinion as to how much she had been administered?

A. Yes. On the basis of these concentrations and on her body weight, it is my opinion, with a high degree of certainty, that the total amount that was given to her exceeded one gram and was somewhere between one and two grams.

* * * * *

(252) GORDON, DR WILLIAM E., being first duly sworn, testified as follows:

Direct Examination

* * * * *

(268) Q. (By Mr. Leitman): Doctor, is there, in this type of therapy, a recommended maximum number of dosages to give to any patient?

(269) A. Well, yes, sir. Where it has appeared to be indicated, one may do this on one, two, three or four occasions; perhaps as many as seven, eight or ten times. Ordinarily, one, two or three occasions will be sufficient.

Q. So, then, it is extremely short-term treatment; is that correct?

A. Yes, sir. And if it is going to help to resolve the problem, it will help in a very short time, perhaps a week, week and a half or two weeks.

Q. Doctor, it has been testified to by Dr. Rieders that in his expert opinion there was between one and two grams of Sodium Pentothal in the body of Grace Neil at the time of the autopsy. And he further testified that he felt that this much, between one and two grams of Sodium Pentothal, could have been administered in fifteen to

thirty minutes—or probably was, to a high degree of certainty, administered within fifteen to thirty minutes.

Now, what kind of a dose is that as far as psychiatric use goes?

A. I would think it would be a completely unheard of dose, and there would be no indication for that kind of dose that I could comprehend.

Q. Now, when you say, "unheard of," is it because it is too little or too large?

A. Too large.

* * * * *

(327) KUTOB, DOCTOR S. DAVID, being first duly sworn, testified as follow:

Cross Examination

By Mr. Leitman:

* * * * *

(328) Q. Isn't it a fact, also, Dr. Kutob, that upon the Defense's request, the Prosecution—through you—made these samples available for the Prosecution—excuse me—for the Defense to examine?

A. Yes, sir.

Q. That is to say that everything you have examined and testified to the jury, any part was turned over to the Defendant; (329) is that not correct?

A. That's right, sir.

Q. And the Defendant had an opportunity, through counsel, to make his own independent examination; is that not correct?

A. Yes, sir.

Mr. Leitman: That will be all, Doctor.

* * * * *

(252) GORDON, DOCTOR WILLIAM E., being first duly sworn, testified as follows:

Direct Examination

By Mr. Leitman:

* * * * *

(265) Q. Thank you.

Now, Doctor, these various reactions that you have told the jury about which one who is anesthetized under Sodium Pentothal may react, did you know these complications before you become a psychiatrist, that is in your general medical education leading to your medical degree?

A. I knew these before I left medical school, yes, sir.

Q. You do not teach in medical school, do you?

(266) A. Not at this time, no.

Q. Have you since you graduated from medical school?

A. I did in '53 and '54.

* * * * *

(144) ALEXANDER, DOCTOR GAYLORD, being first duly sworn, testified as follows:

Direct Examination

* * * * *

(149) Q. I see.

Doctor, when you are personally giving a patient Sodium Pentothal, do you ever leave that person unattended?

A. Never under any circumstances.

Q. Why is it?

A. Well, it is just too lethal a drug. You are administering a general anesthetic and would never administer a general anesthetic to any person and leave them un-

attended. Their airway could obstruct. They could vomit and aspirate. Their blood pressure could fall out. A number of things could happen to this patient if you weren't there to correct it.

Q. So, you would never leave the patient unattended?

A. Never.

(150) Q. Do you say this as an anesthesiologist only or does the average medical doctor, is he taught that also?

A. I am sure that the average medical doctor certainly going through school today is taught that. And I can't imagine anyone using a drug like this without staying in contact with the patients.

Q. I see.

Do you have an opinion, Doctor, as to what type of medical practice it would be for one to administer Sodium Pentothal to a patient and then leave that patient completely unattended?

A. Well, it would be my personal opinion that this would be really malpractice and negligence.

Q. Can you state that to a reasonable medical certainty?

A. Yes, I feel I could.

Q. Doctor, have you ever heard of a patient being treated for heart disease or high blood pressure with therapeutic doses of Sodium Pentothal?

A. No, I have never heard of a patient being treated for these conditions with Pentothal. As a matter of fact, we tend to avoid this drug in patients with heart disease.

* * * * *

(227) SWEET, DOCTOR ROBERT B., being first duly sworn, testified as follows:

Direct Examination

By Mr. Bain:

* * * * *

(239) Q. Doctor, would you have an opinion as to whether or not it would ever be good medical practice to begin to administer a drip to a patient and then walk off and leave them for some period of time?

(240) A. I feel very strongly this is, in my opinion, gross negligence, medical negligence, to leave the patient when he is either getting Pentothal drip or has gotten it and has not recovered from it.

Q. Doctor, what precautions do you take in your hospital or what is the procedure after a person has been administered the Sodium Pentothal and then you stop and they are taken out of the operating room? What precautions are taken?

A. These patients are never left alone. We—whoever administers the anesthetic takes the patient back with either a nurse or some other individual—sometimes the surgeon, if it is from surgery—will accompany the patient back on a stretcher or on his bed. We take them to what we call a recovery unit, where the patient will receive special nursing care, constant observation, until the individual is awake enough, alert enough, to be able to cerebrate, be able to say what his name is, where he lives, how old he is, where he is at that time; so that if he has any problems, he can make these known if he goes back to his room where he doesn't have this constant observation. So, we don't return the patient from this constant care until he is alert.

Q. Doctor, in and of itself, is Sodium Pentothal of any therapeutic value or does it cure heart disease?

A. It isn't that kind of a drug. Pentothal is not a drug to treat illnesses. It produces a state in which other therapy sometimes, such as surgery, can be carried out to treat (241) a patient. But the drug itself is not considered a therapeutic drug.

Q. Doctor, you are familiar with coronary thrombosis, are you?

A. Yes, sir.

Q. Based on your experience, would you say that you are able to establish the cause of death of a particular person as being coronary thrombosis by looking at them?

A. No; one can't make that diagnosis, in my opinion, by looking at a person.

Q. Is it true, Doctor, that to establish coronary thrombosis as the cause of death, an autopsy would have to be performed?

A. Yes, sir.

Q. Doctor, I am going to hand you People's Exhibit #2, a series of six pictures of a room, and ask you if you would examine those pictures, please.

Have you had a chance to look at them?

A. Yes.

Q. Doctor from looking at those pictures, could you tell us whether or not you would consider the room that these pictures represent a proper environment for the giving of Sodium Pentothal?

Mr. Rowston: Objection, your Honor.

The Court: State it.

Mr. Rowston: It has not been determined that this man has any experience in the facilities used in private offices. All of the testimony relates to (242) administration of this drug under hospital facilities. I think it is a matter of opinion on his behalf, anyway, it is a matter of personal judgment.

I have no objection to his testifying as to what is used in a hospital, if he wishes. But I think his opinion, whether or not this is adequate equipment, is immaterial.

The Court: He may answer. Overruled.

The Witness: Would you restate the question?

Mr. Bain: Yes.

Q. (By Mr. Bain): You have had a chance to look at these pictures, Doctor. Would you say that—in your opinion, is this the proper environment to give Sodium Pentothal in?

A. I would think not.

Q. And do you see any of the—did you see any of these pictures any of the equipment that you have discussed with us?

A. None of the equipment was observable in that series of pictures that I saw.

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(85) TEEPLES, DETECTIVE EARL, being first duly sworn, testified as follows:

Direct Examination

By Mr. Bain:

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(110) Q. Did Dr. Clark explain to you the procedure he followed that evening in administering Sodium Pentothal to Mrs. Neil?

A. Yes; he said that he had started the drip treatment of Sodium Pentothal in the treatment room, and started the treatment, then went away and into another part of the building and closed the door, and left her in there alone.

Q. Did he tell you how long he had remained there with her before he left the room?

A. I don't remember—I don't think he did. I don't recall him saying.

Q. Did he tell you how long this treatment required?

A. He said sometimes it would take half an hour and sometimes it would take an hour, depending on how fast it dripped.

Q. Did he say anything about leaving after the Sodium Pentothal (111) had been absorbed into the body of Grace Neil?

A. Leaving the room?

Q. After she had absorbed it,

A. No, sir. He told me the treatment was going on and that he had checked it a couple of times, and that he had asked Mrs. Clark to check and see if it was still going or if it had completely dripped into her, and she had gone in to check and found that Mrs. Neil was dead.

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(32) OLSEN, DOCTOR RICHARD, being first duly sworn, testified as follows:

Direct Examination

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(37) Q. (By Mr. Bain): Did you have the occasion to examine the heart of Mrs. Neil, Doctor?

A. Yes.

Q. What did your examination of that heart reveal?

A. Her heart was completely normal for her age. It was in good condition.

Q. And did you have occasion, Doctor, to make whatever examination would be necessary to determine whether or not Mrs. Neil had suffered from high blood pressure?

A. Yes.

Q. And what were the results of that examination—strike that.

How do you conduct that particular examination?

A. High blood pressure produces enlargement of the heart to pump the blood against the increased resistance. The kidneys usually show changes associated with it. I found no such evidence present. The kidneys and the heart were normal. There was no enlargement of the heart.

Q. Doctor, were you able to determine from your examination of the heart whether or not Grace Neil had ever suffered from coronary thrombosis?

A. She had not.

Q. Based on your medical experience, are you able to estimate—or were you able to estimate—the approximate weight (38) of Grace Neil?

A. I thought her weight was about average for a middle-aged woman of her age. She was about five feet tall, and I thought she weighed possibly one hundred twenty-five, or thereabouts, pounds. She had reached the age when women tend to accumulate a little excess weight.

Q. Was she obese in any manner?

A. I would not consider it so. Though I am rather old and the modern, ultra-slim model may not be quite my ideal.

Q. Doctor, if Mrs. Neil had any other type of heart defect, would that have shown up in the autopsy?

A. Yes.

Mr. Bain: Thank you, Doctor.

I have no further questions.

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